IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947

No. 223

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION ET AL.,
*Appellants*

*v.*

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION*

## BRIEF FOR THE CLEVELAND UNION STOCK YARDS COMPANY, APPELLEE

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### OPINION BELOW

The opinion of the specially constituted district court (R. 148-152) is reported in 71 F. Supp. 499. The report of the Commission (R. 28-50) is reported in 266 I.C.C. 55.

### JURISDICTION

The final order and judgment, here for review on appeal, was entered on May 14, 1947 (R. 190), in the District Court of the United States for the Northern District of Ohio, Eastern Division, by a statutory court consisting of one Circuit and two District Judges, specially convoked under the provisions of 28 U.S.C. 47, permanently en-

joining the enforcement of the order (R. 65-66) of the Interstate Commerce Commission, entered pursuant to its report of May 3, 1946 (R. 28-50; 266 I.C.C. 55). A single petition for appeal was filed by the appellants on July 11, 1947 (R. 191-192), and was allowed the same day (R. 192). Appellees filed a motion to affirm, but this Court noted probable jurisdiction on October 13, 1947 (R. 619). The jurisdiction of this Court rests on Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 220 (28 U.S.C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U.S.C. 345).

## QUESTIONS PRESENTED

1. Whether a non-carrier, in permitting a common carrier by rail to use its private track, may limit the use of the track to the movement of such traffic as will not interfere with its business.

2. Whether the Interstate Commerce Commission has authority to require a non-carrier to permit the use of its private track by a common carrier by rail in contravention of a trackage agreement between the parties.

## STATUTES INVOLVED

The Cleveland Union Stock Yards Company (hereinafter referred to as the "Stock Yards") is satisfied with the statement of the provisions of the Interstate Commerce Act, as amended, and of the Elkins Act, as set forth in Appendix A, pages 77-90, of the brief for the United States and the Interstate Commerce Commission (here-

inafter referred to as the "Government's brief"). However, for the convenience of the Court, additional provisions of such Acts are set forth in Appendix A of this brief, since reference hereinafter is made thereto.

## STATEMENT

There is no dispute between the parties in the case at bar as to the essential facts upon which depend a solution to the controversy. However, the Stock Yards believes that it is necessary to make a more inclusive statement of the facts than that contained in the Government's brief, in order that the respective rights and liabilities of the various parties may be determined in their proper perspective.

The present appeal (R. 191-192) is from a final order and judgment (R. 190) entered by the court below, which granted relief demanded by the non-carrier and common carrier appellees in two actions (R. 4; R. 88)[1] brought to enjoin enforcement

[1] The appellees consist of the following common carriers by rail: The Baltimore & Ohio Railroad, the Pennsylvania Railroad, the Erie Railroad, the Wheeling & Lake Erie Railroad, and the New York Central Railroad (the last mentioned carrier is the successor in interest to the Cleveland, Cincinnati, Chicago, and St. Louis Railroad, hereafter referred to in this brief as the "Big Four"). In addition, the Stock Yards, a non-carrier, having contractual relations with the New York Central with respect to a certain industrial sidetrack, located on the Stock Yards' land and owned by it, is also an appellee. All of the appellees were respondents in the proceeding instituted by Swift & Company before the Interstate Commerce Commission in September, 1941, and, in addition, the New York, Chicago, and St. Louis Railroad (sometimes referred to in the record as the "Nickel Plate"), and the Livestock Terminal Service Company were also respondents in the proceeding before the Commission.

of an order of the Interstate Commerce Commission (R. 65-66; 266 I.C.C. 55), which had ordered all of the appellees to refrain from refusing to deliver livestock to the sidetrack of Swift & Company at Cleveland, Ohio, and to establish and maintain tariffs providing for the delivery to Swift & Company at such place of its interstate shipments of livestock carried over the lines of the appellees herein which are common carriers by rail and consigned to Swift & Company.

The Cleveland Union Stock Yards Company was incorporated under the laws of the State of Ohio in 1893 for the purpose of operating a general stockyards business, and since that time it has been continuously engaged in operating a public stockyards on West 65th Street in Cleveland, Ohio (R. 89). It is a stockyard subject to the provisions of the Packers and Stockyards Act of 1921, as amended (7 U.S.C. 181 *et seq.*) (R. 90).

In 1899 the Stock Yards, desiring a side track for use in connection with its business in Cleveland, entered into an agreement (Exhibit 14; R. 347-350) with the Big Four (to whose lines the New York Central Railroad Company succeeded in 1930). The main line of the railroad company passes along the northern side of the Stock Yards' premises in a general easterly-westerly direction. By the terms of the agreement, the Big Four constructed 1619 feet of sidetrack, extending southward on the property of the Stock Yards, and connecting with the main line by means of an initial turnout of 132 feet owned by the railroad and located on its land. (See the green and yellow tracks

on the map appearing in Appendix B of the Government's brief.) The track owned by the Stock Yards (hereinafter referred to as "Track 1619") runs parallel with West 65th Street (formerly known as Gordon Street) on the eastern edge of the Stock Yards' premises. The 1899 agreement provided that the Stock Yards would do the necessary grading and pay the costs of constructing and maintaining the side track. The railroad had the right to use the siding, without cost, in connection with other business than that of the Stock Yards when the track was not occupied by the Stock Yards, provided such use did not interfere with the business of the Stock Yards. The contract contained a sixty-day termination clause (Ex. 14; R. 347-350).

As noted in the statement contained in the Government's brief, the 1899 agreement between the Stock Yards and the railroad was superseded by an agreement dated June 16, 1924 (Ex. 9, R. 339)[2]. The 1924 agreement contained a thirty-day termination clause (R. 341).

Paragraph 4 of the 1924 agreement was also

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[2] Paragraph 4 of the agreement of June 16, 1924, provided as follows:

> "Fourth. All of said tracks, irrespective of ownership, shall be maintained by the railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, (b) the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land."

amended, effective February 1, 1935.[3] Under the terms of the amended agreement in 1935 the railroad was permitted to use Track 1619 except for competitive traffic, i.e., livestock, with respect to which it was agreed that the parties would have to make a separate contract as to the charge.

Swift & Company purchased the Peoples Packing Company on January 24, 1905. In 1907, Swift & Company began negotiating[4] with the Big Four to secure a connection between its plant located between West 65th Street and West 63rd Street (then known as Prim Street) and the main line of the railroad. Between 1907 and 1910, the plan

[3] The amendment was accomplished by amending the fourth paragraph to the 1924 agreement to read as follows:

> "Fourth. All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use, *except for competitive traffic a charge for which use shall be the subject of a separate agreement*, of any and all tracks or portions thereof belonging to the Industry and located on its land." (Emphasis supplied.)

[4] Exhibit No. 11 (R. 343-347) contains a stipulation entered into by the parties with respect to some of the facts respecting the negotiations under consideration. Many of the original letters and other correspondence evidencing transactions at this time were destroyed in a flood in Cincinnati, and the stipulation is based upon some missing documents discovered while this case was pending before the Commission. Reference to this Exhibit will disclose that the implication by Swift & Co. that it never had an opportunity to obtain a direct connection with the main line of the railroad is contrary to the stipulated facts. (See Swift's brief, p. 49.)

upon which Swift & Company worked to secure such a rail connection consisted in building a side-track northward along West 63rd Street until it would meet the main line of the railroad running east and west through the city (see map in Appendix B to the Government's brief).

In order to carry out this plan, Swift & Company secured the passage of an ordinance by the city of Cleveland dated May 25, 1908, authorizing the railroad company to construct a spur and side-track as indicated along West 63rd Street (R. 449). Since it would also be necessary to condemn part of the land of the Lake Erie Provision Company in order to construct this track, Swift & Company induced the Big Four to file condemnation proceedings against such company to procure the necessary land.[5]

The total cost of building the track, including the damages awarded to the Lake Erie Provision Company, amounted to approximately $24,500. Swift & Company was unwilling to pay more than $2,000 of this total. It expected the railroad or the other packers along West 63rd Street who also would be benefited to pay the remainder. Consequently, the plan to build a track up West 63rd Street and to secure a direct connection with the railroad company's main line was abandoned.

In March, 1910, Swift & Company approached the railroad with another plan, which proposed

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[5] Upon the petition of the Big Four, the Court of Insolvency of Cuyahoga County, Ohio, at the May 1909 term, approved of the condemnation of the land of the Lake Erie Provision Company and awarded damages in the sum of $13,500 (Ex. 11, R. 344).

that it be served by utilizing Track 1619 owned and operated by the Stock Yards. After some negotiations, this plan was adopted. To effectuate it, Swift & Company secured the passage of another ordinance by the city of Cleveland on September 6, 1910, permitting a track to be built across West 65th Street (R. 416-417). The railroad constructed a track 793 feet long connecting with the southerly end of Track 1619. In this manner, Swift secured a connection with its private siding.

Swift & Company knew in 1910 at the time it finally decided to put into effect the alternative plan just mentioned, rather than to build a direct connection with the main line of the railroad, that the Stock Yards owned and operated Track 1619.[6]

After the connection above-mentioned was made with the private sidetracks of Swift & Company,

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[6] The following other companies, besides Swift & Company, have, since 1910, been located so as to secure connections with the main line of the New York Central Railroad Company by way of Track 1619: Standard Beef Company (Ex. 33, R. 425); Kreinberg and Krasney (Ex. 34, R. 426); Earl C. Gibbs (Ex. 35, R. 427); Hughes Provision Company (Ex. 41, R. 432); Koblenzer Brothers (Ex. 42, R. 433); and Theurer-Norton Provision Co. (Ex. 43, R. 434). The private sidetracks of all of these industries, including those of Swift & Company, were constructed and are maintained under conventional sidetrack agreements between the industries and the New York Central Railroad, and each of these agreements contains provisions permitting termination of the arrangement upon short periods of notice.

Other packers located in Cleveland, the Lake Erie Provision Company, the Long Dressed Beef Company, and Ohio Provision Company, are served by the common carriers operating in Cleveland without using the industrial sidetrack belonging to the Stock Yards (R. 32-33). These packers have connections direct with the main line of the New York Central.

the railroads published tariffs showing deliveries to Swift & Company at Cleveland, Ohio, at line haul rates. The common carriers, other than the New York Central, made such deliveries to Swift & Company by virtue of a reciprocal switching arrangement under which the New York Central made deliveries from and to such other carriers and Swift & Company over Track 1619 in accordance with a switching charge which was absorbed by the carriers.

Prior to 1930, Track 1619 was used for making few, if any, deliveries of livestock to the siding of Swift & Company. Before that time, Swift & Company and the packers in the area were accustomed to receiving livestock through the yards of the Stock Yards Company.

Yardage charges are assessed by the Stock Yards, as approved by the Secretary of Agriculture pursuant to the Packers and Stockyards Act of 1921, as amended (7 U.S.C. 181 *et seq.*), on direct shipments of livestock received at the Yard.

Before 1930, Swift & Company was directly interested, financially, in the Stock Yards Company. It owned a substantial number of the shares of such Yard; the manager of Swift & Company was on the Board of Directors of the Stock Yards Company; and there were, otherwise, close personal and financial connections. As early as 1921 Swift & Company, as a result of anti-trust litigation against it, was ordered to divest itself of ownership in such companies as the Stock Yards. By an order entered in the anti-trust suit in 1931, Swift & Company was given a period of time (until 1936) to divest itself of all such control.

Between 1930 and 1934, Swift & Company had 1161 carloads of livestock delivered direct to its siding at line haul rates to Cleveland. During the same period, it received 2260 carloads of livestock through the Stock Yards (R. 34). The volume of movement of livestock over its track direct to Swift & Company became so substantial that, in late 1934, in order to protect its interests, the Stock Yards notified the railroads that the 1924 agreement covering use of Track 1619 would be terminated (Ex. 31, R. 423). The expressed reason for such action was that the Stock Yards Company could not permit its facilities thus to be used for competitive purposes (see, also, Ex. 32, R. 424). However, before the termination of the agreement took place, the amendment, effective February 1, 1935, previously noted, was made. By such amendment the carriers were permitted to continue to use Track 1619 with respect to all commodities other than livestock; and it was stipulated that the track would not be used for shipping livestock in the absence of a special agreement therefor providing compensation to be agreed upon by the parties (Ex. 48, R. 437-442). Under this arrangement, since 1935, inbound and outbound shipments to and from Swift & Company of all commodities other than livestock have been continued.

The carriers were never able to agree with the Stock Yards upon a charge to be made for the use of Track 1619 for livestock purposes, since the carriers were unwilling to pay the amount proposed by the Stock Yards, namely, an amount equivalent to what the Stock Yards would receive

as yardage charges if shipments of livestock were made through the yards.

Accordingly, the carriers notified Swift & Company and the other industries served by utilizing Track 1619, on October 6, 1938, that they would be unable to make any further shipments of livestock over this track.[7] Also, the New York Central Railroad Company, effective November 12, 1938, canceled its reciprocal switching charge applicable on shipments moving into Cleveland by way of other carriers. The result of this was to leave no published tariff, with respect to these other carriers, showing deliveries of livestock to Swift & Company. In 1941, Swift & Company demanded of the carriers that they make shipments of livestock direct to its siding, by traversing Track 1619, but the carriers refused unless Swift & Company first made arrangements with the Stock Yards Company for the use of such track (Ex. 4, R. 317 and Ex. 5, R. 318). Thereafter, Swift & Company in September, 1941, filed its complaint with the Commission.[8]

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[7] Ex. 33, R. 425; Ex. 34, R. 426; Ex. 35, R. 427; Ex. 36, R. 428; Ex. 37, R. 429; Ex. 41, R. 432; Ex. 42, R. 433; and Ex. 43, R. 434. In addition, Swift & Company and the railroads exchanged other letters with reference to the subject. Ex. 37, R. 429; Ex. 38, R. 430; Ex. 39, R. 430; Ex. 40, R. 431.

[8] None of the other six packers who are situated similar to Swift & Company with respect to Track 1619, has complained or otherwise participated in this proceeding. The complaint charged violations of the following sections of the Interstate Commerce Act, as amended: 1(5), 1(3), 1(18), 1(19), 1(20), 2, 3(1). In general, the complaint was based upon the refusal of the common carriers to deliver all commodities, including livestock, to the private siding of Swift & Company, at line haul rates. In addi-

*Proceedings before the Commission:* Two hearings were conducted before examiners appointed by the Commission, the first on April 22, 1942 (R. 203-232). The examiner filed a report recommending that the complaint be dismissed. Exceptions were taken by Swift & Company to such report and thereafter, on June 4, 1943, the Commission heard oral argument (R. 465-502). The Commission, on its own motion, ordered the proceeding reopened for the taking of further testimony, and this was done in a hearing held on June 22, 1944 (R. 235 *et seq.*) before two examiners. The examiners again prepared a report recommending that the complaint be dismissed. The matter came on once more for oral hearing before the Commission on October 3, 1945 (R. 502-546). On May 3, 1946, the Commission issued its order (R. 64-65) based upon its report (R. 28, *et seq.*), appearing in 226 I.C.C. 55. The Commission did not make separate findings of fact.[9]

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tion, an unreasonable preference and an unreasonable prejudice based on Section 3(1) of the Act was predicated upon the fact that other companies located at Cleveland (the Lake Erie Provision Company, the Ohio Provision Company, and the Long Dressed Beef Company), also engaged in the meat-packing business, did receive shipments of livestock at their respective plants at line haul rates. Such plants have direct connections with the main line of the New York Central and it is unnecessary to use Track 1619 in order to reach them. See Note 6, *supra*.

[9] This proceeding presented for decision to the Commission, as it later presented to the court below, and as it now presents to this Court, only questions of law. There are no issues between the parties as to factual controversy. While there are many facts covering a long

In its report the Commission held that, by the series of agreements between the Stock Yards and the railroad respecting Track 1619, the Stock Yards had contracted for the public use of its

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period of time to be taken into consideration in reaching decision on the legal issues, the Commission was not called upon and had no occasion to make any administrative decisions on discretionary matters committed to its expert judgment. Thus, the proceeding did not require the exercise of expert judgment of a "tribunal appointed by law and informed by experience," *Illinois Central Railroad Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454, as to complicated factual issues relative to technical transportation matters. Hence, prior decisions by this Court, *General American Tank Car Corporation* v. *Eldorado Terminal Co.*, 308 U. S. 422, 433; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 138-140, 146; *Armour and Company*, v. *Alton Railroad Co.*, 312 U. S. 195; *St. Louis &c. Ry. Co.* v. *Brownsville District*, 304 U. S. 295, 301; *Yakus* v. *United States*, 321 U. S. 414, 433; *Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602; *Baltimore and Ohio Railroad Co.* v. *United States*, 298 U. S. 349, 358; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 665; *Board of Trade of Kansas City.* v. *United States*, 314 U. S. 534, 546; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 535-536; *Gray* v. *Powell*, 314 U. S. 402, 411, 412, wherein the Court expressed the due regard to be ascribed to the Commission's judgments with respect to administrative and other discretionary matters committed to its expert judgment, are not applicable to the Commission's determinations in the case at bar, since the issues which the Commission undertook to decide here were largely matters of Ohio real property law as to which the Commission has no expert knowledge. The appropriate approach by the Court to the solution of the issue between the parties as to the proper legal conclusion to be drawn from the facts admitted on all sides is indicated in the following passage written by Mr. Justice Day in the *Tap Line Cases*, 234 U. S. 1, 22:

> "It is further insisted upon the authority of *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, and other cases in this court which have followed that decision, that in the present cases the

track (R. 36-38) and that, as a result, Track 1619 had become part of the facilities of the New York Cent al's railroad. The Commission held that the failure of the railroads to deliver livestock over the track to the siding of Swift & Company constituted a violation of Sections 1(6), 1(9), and 3(1) of the Act.[10] The Commission held ineffectual the contractual limitation by the Stock Yard of the right to use the track for livestock purposes, saying that the insistence of the Stock Yards upon the payment demanded for such use of its track (i. e., a payment equivalent to yardage charges), coupled with the limitation of the use of the track for livestock purposes in the 1935 agreement, constituted a "penalty" (R. 40).

With respect to its authority to issue an order against the Stock Yards, the Commission held that "The Stock Yards is a proper party defendant in this proceeding, as its interests are directly affected by the rates, regulations, or practices, under consideration within the meaning of Sec. 2 of the Elkins Act, 49 USCA, Sec. 42 shown in the footnote." Thereupon the Commission issued its

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decision rests upon conclusions of the Commission as to matters of fact only, which are within the sole jurisdiction of that body and not reviewable in the courts. But we shall consider the case upon the findings of fact preceding this opinion, which are identical with those made by the Commission, and test the conclusions reached as matters of law, giving proper consideration to matters of fact which are not in dispute."

See, also, note 37, *infra*.

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[10] The complaint did not even allege violations of sections 1 (6) and 1 (9) of the Act. See note 8, *supra*.

order against all of the common carriers and against the Stock Yards. Three of the Commissioners (Barnard, Patterson, and Splawn), dissented (R. 45-49). Commissioner Aitchison did not participate. Petitions for reconsideration were filed and overruled.

*Proceedings in the District Court:* The common carrier appellees and the Stock Yards filed separate actions in the District Court of the United States for the Northern District of Ohio, Eastern Division, (R. 4, R. 88), to enjoin enforcement of the order of the Commission on the ground that it transcended its authority in issuing its order of May 3, 1946. The action filed by the Stock Yards was consolidated with the action filed by the common carrier appellees for purposes of trial on February 25, 1947 (R. 96); and the findings of fact and conclusions of law entered by the court below on May 9, 1947 (R. 178), and the final order and judgment of the court below entered on May 14, 1947 (R. 190), dealt with both cases. The United States and the Interstate Commerce Commission were named as parties defendant in both actions in the court below. The appellant, Swift & Company, was permitted to intervene and file an answer. (R. 66; 104).

After oral argument before the specially constituted three-judge court on February 25, 1947, the court rendered its opinion on March 11, 1947 (R. 148) which is reported in 71 F. Supp. 499.

In its opinion the court stated that (R. 149):

> "We are mindful of the Commission's powers and of the effect to be given its findings in respect of matters within its juris-

diction. In this case we consider only the legality of its order upon the record. The railroad complains that the Commission's order requires it to do an unlawful act and that it cannot comply with the order because it is without control over the Stock Yards' property and Track 1619; that the contract for the use of the track excludes the transportation of shipments of livestock to Swift & Company and that it, the railroad, is without the means of accomplishing what the Commission orders. The Stock Yards Company asserts that the Commission is without jurisdiction as to it and that even if it has jurisdiction and power to enter a lawful order against it the order made is unlawful in that it appropriates its property without due process of law.

* * *

"We address ourselves to what we conceive to be the principal and fatal flaw in the Commission's order. We assume, without deciding, that under the Elkins Act the Commission has jurisdiction over the Stock Yards Company when made a party as in this case and has the power to enter a lawful order affecting the Stock Yards in respect of matters in which the Commission has authority."

The court thereupon held that the Commission had erred as a matter of law in ordering the railroads to deliver livestock to Swift & Company's siding over the 1619 feet of track of the Stock Yards Company which is wholly private property. The court pointed out that all of the Commission's conclusions were based upon its basic conclusion

that Track 1619 had been devoted to public use. In this connection the court said (R. 150):

> "We think the finding does not have legal support in the record since it leaves out of consideration the fact that such use has been made from the beginning to the end under the provisions of a written contract expressly asserting ownership and reserving therein the property right of the Stock Yards Company limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively. Certainly, upon these facts and upon the record there has been no such devotion of Track 1619 to public use as to amount to a dedication of the Stock Yards property as a public highway or as a part of the Railroad Company's system over which the latter lawfully may move shipments of freight or livestock to the Swift & Company plant."

The court said, further (R. 151):

> "Here, the Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts. The entrance upon the land of the Stock Yards Company and the use of its track were not by sufferance but under the terms of a written contract, the provisions of which were well understood by Swift & Company as well as by the Railroad.
>
> "Although the Commission holds that Track 1619 is now and for some years has been devoted to the public use *this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period it*

*has constantly, consistently, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track.* Every person serving, or being served by the use of Track 1619 has had full knowledge of that fact. No one has been led to act to his harm by any sufferance or acquiescence, or by any failure upon the part of the Stock Yards Company openly to assert its complete ownership and restrict its use." (Emphasis supplied).

With respect to the contention made both before the Commission and before the court below on behalf of appellants to the effect that Track 1619 had become a part of the New York Central Railroad Company and that the railroad company could not lawfully refuse to utilize such track or to contract for its limited use, the court said (R. 152):

"* * * If the Railroad was out of bounds in entering into a contract with the Stock Yards Company which permitted withdrawal of service to Swift & Company, its wrongful conduct, if such it was, cannot be rectified by penalizing the Stock Yards Company and by taking part of its property. If the Commission lawfully may compel the Railroad Company to use Track 1619 as its own or as one which it controls it would by such order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess. The order effectually subordinates and subjects the Stock Yards Company's owner-

> ship of its property to the beneficial and preferential use of Swift & Company without due process of law."

The court found it unnecessary to decide, in view of its decision reached on the question of whether the property had been devoted to a public use, whether the Commission or the court below had jurisdiction over the Stock Yards Company under the Elkins Act. As to this the court said (R. 152):

> "We think that jurisdiction of the Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Commission to order the Stock Yards Company to desist from the practice of asserting or exercising complete ownership of its property. The Commission cannot, as we think, lawfully order the Railroad to do what by law is forbidden by declaring that the Stock Yards Company's track under the circumstances here is a part of the New York Central Railroad system. Such transfer of property lawfully cannot be made short of condemnation and compensation."

The court below accordingly enjoined the enforcement of the order of the Interstate Commerce Commission (R. 190). The appeal heretofore noted to this court followed (R. 192).

## SUMMARY OF ARGUMENT

The fundamental error committed by the Commission in this case is that it undertook to strip the Stock Yards of its rights as owner of Track 1619 in excess of any authority conferred upon the

Commission by the Interstate Commerce Act, as amended, and thus deprived the Stock Yards of its property without due process of law.

## I

The Commission's order directs the Stock Yards, which is neither a carrier nor a shipper, and the common carriers by rail (1) to cease and desist from refusing to deliver, and (2) to establish and put in force, and maintain in force thereafter, a schedule providing for the delivery of, to the side-track of Swift & Company, its interstate shipments of livestock carried over the lines of the common carrier and consigned to Swift's plant at Cleveland.

It is plain that the order is incapable of being performed by the Stock Yards, since the Stock Yards is not engaged in the business of delivering livestock by rail.

A. There has never been any question but that the Stock Yards is the owner of Track 1619 and of the land on which it is located. While the Stock Yards' ownership is conceded by appellants, they take the position that ownership is immaterial and rely instead on the Commission's finding that the Stock Yards' track is a part of the railroad system of the New York Central. On the contrary, the Stock Yards has committed no act, nor acquiesced in the conduct of others, by which it could lawfully be held to have divested itself of its right as owner to use its property for its benefit and to prevent it from being used to its disadvantage.

B. In Ohio a railroad can acquire property in only three ways: by gift, by conveyance, or by ap-

propriation in accordance with statute. *Todd v. Pittsburg*, 19 Oh. St. 514. In Ohio a railroad corporation cannot acquire property by way of dedication. It is clear that the New York Central has no title to or interest in Track 1619 by virtue of any of the recognized modes available to it for acquiring property in Ohio. Its sole right to operate over Track 1619 stems from its trackage agreement with the Stock Yards, which agreement contains a limitation on the use of the track for livestock purposes which it was lawful for the Stock Yards, as the owner of Track 1619, to assert. Either the agreement is valid in its entirety and the railroad must use Track 1619 solely in accordance therewith, or the agreement is invalid and the railroad has no right whatever to operate upon the track. *Union Pacific Ry. Co.* v. *Chicago, etc., Ry. Co.*, 163 U. S. 564. Both the Commission and the courts have repeatedly held that, under similar trackage agreements, even those entirely between carriers, the parties have only limited rights thereunder, and are under no duty by virtue of the Interstate Commerce Act, or otherwise, to use the tracks in contravention of their agreements; such agreements do not disable contracting carriers from performing duties imposed upon them by law. *Alford* v. *Chicago, Rock Island and Pacific Ry. Co.*, 3 I.C.C. 519, 522; *Hocking Domestic Coal Co.* v. *K. & M. Ry. Co.*, 44 I.C.C. 392, 396 *et seq.*; *Chicago, M. & St. P., and P. R. Co. Trustees Operation*, 247 I.C.C. 1, 7; *Rock Island Ry.* v. *Rio Grande R.R.*, 143 U.S. 596, 609; *Union Pacific Ry. Co.* v. *Chicago, etc., Ry. Co.*, 163 U.S. 564, 583, 589, 603.

C. Swift & Company, for years, has reaped the

benefits of the trackage agreement betweeen the Stock Yards and the railroad company, and for that and other reasons, is in no position now to press for use of the track free from the contractual limitations to which it is subject.

The Stock Yards' track has not been dedicated to the public use under governing Ohio law pertaining either to (1) a statutory dedication (*The Lessee of the Incorporated Village of Fulton* v. *Mehrenfeld*, 8 Oh. St. 440, 444; *Wisby* v. *Bonte*, 19 Oh. St. 238, 245; *Penquite* v. *Lawrence*, 11 Oh. St. 274) or (2) a common law dedication (*The Lessee of the Incorporated Village of Fulton* v. *Mehrenfeld*, *supra*; *Morgan* v. *Railroad Co.*, 96 U.S. 716, 720 et seq.). The public has acquired no prescriptive right to use Track 1619. *Railroad Co.* v. *The Village of Roseville*, 76 Oh. St. 108.

D. Dedication of private property to public use may be made *cum onere*. *Lynchburg Traction and Light Co.* v. *Lynchburg*, 142 Va. 255; *Village of Bradley* v. *New York Central R.R. Co.*, 296 Ill. 383; 1 *Elliott on Roads and Streets* (2nd Ed.) Section 148. The public as the donee of property dedicated or devoted to its use may accept or not, but by unconditional acceptance thereby agrees to perform the conditions annexed to the gift. *Thompson on Real Property* (Permanent Edition, Revised and Enlarged) Section 490.

II

A. It is conceded that the Stock Yards is not a "common carrier," nor is it engaged in "transportation" by "railroad" within the meaning of the Interstate Commerce Act by virtue of its ownership of Track 1619.

*The Interstate Commerce Act does not authorize the Commission's order against the Stock Yards:* The Interstate Commerce Act, neither expressly nor by implication, authorizes the Commission to issue an order against a non-carrier situated as is the Stock Yards herein. The definitions of the terms "common carrier," "railroad," and "transportation" in Section 1(3) of the Act are not self-empowering, but are merely preliminary to the grants of authority provided elsewhere in the statute. *Ellis* v. *Interstate Commerce Commission*, 237 U.S. 434; *Pennsylvania R. Co.* v. *P. U. Comm'n*, 298 U.S. 170, 174. *Cf. Black & White Taxi Co.* v. *B. & Y. Taxi Co.*, 276 U.S. 518.

If the definitions in Section 1 in and of themselves provide the Commission with regulatory authority, it would not have been necessary for Congress, by special enactments for that purpose, to include express companies, pipe line companies, or sleeping car companies within the term "common carrier," nor would it have been necessary for the Congress, in order to enable the Commission to extend its regulatory authority over the compensation which rail carriers should pay for the use of privately owned cars, to include in the Transportation Act of 1940 an amendment to Section 1 (14) of the Act so as specifically to provide such authorization. *Refrigerator Car Mileage Allowances*, 232 I.C.C. 276, 278-9; *General American Tank Car Corp.* v. *Eldorado Terminal Co.*, 308 U.S. 422, 428-429.

*Section 2 of the Elkins Act does not empower the Commission to issue the order in question:* Section 2 of the Elkins Act merely authorizes the Commis-

sion or the courts, *in proceedings before them involving the practices condemned by the Elkins Act*, to make all persons participating in or affected by such practices parties to the proceedings and subject to appropriate orders and writs. This follows from a consideration of the provisions of Section 2 and related sections in the light of the language of the Elkins Act, of its legislative history, and of the evil against which it was directed. *Baltimore & Ohio Ry.* v. *United States*, 277 U.S. 291, 299-300; *Twelfth Annual Report of the Interstate Commerce Commission* (1898), pp. 5 *et seq.*; *Fifteenth Annual Report of th Interstate Commerce Commission* (1901), pp. 5-16; *Seventeenth Annual Report of the Interstate Commerce Commission* (1903), pp. 5-10; *House Report No. 3765*, 57th Cong., 2nd Sess., Feb. 12, 1903. (To accompany S. 7053), pp. 5-6, 36 *Cong. Rec.* 2151-2159. Wherever the Commission's jurisdiction has attached over a non-carrier in cases involving Section 2 of the Elkins Act, the case has involved *a rate concession or advantage to a favored shipper.* The Commission's authority to invoke Section 2 of the Elkins Act to other types of situations has never received judicial approval. *Ellis* v. *Interstate Commerce Commission*, 237 U.S. 434, 445. The case at hand does *not* involve a rate concession or advantage to a favored shipper.

B. The authority of the Commission with respect to trackage agreements even between carriers is strictly limited by the provisions of the Act. Compare Section 1 (18) with Section 5 (2) of the Act. *Chicago, M., St. P. & P. R. Company Trustees Operation*, 247 I.C.C. 1, 7; *Thompson* v. *Texas-Mexi-*

*can R. Co.*, 328 U.S. 134, 146. No provision will be found in the Act which gives the Commission any authority with respect to trackage agreements made by carriers with non-carriers for the right to use tracks owned by the non-carriers for special purposes. The settled course of both administrative and judicial decisions supports the validity of trackage agreements similar to the one in the case at bar and refutes the contention that such agreements disable carriers from performing their lawful duties. *Rock Island Ry.* v. *Rio Grande R.R., supra; Union Pacific Ry. Co.* v. *Chicago, etc., Ry. Co., supra; K. & M. Ry. Co.* v. *Public Utilities Comm'n of Ohio*, 96 Oh. St. 414, 426; *Sholl Brothers* v. *Peoria and Pekin Ry. Co.*, 276 Ill. 267, 271, 274; *Alabama Central R.R. Co.* v. *Alabama Public Service Comm'n*, 200 Ala. 536, 537; *Alford* v. *Chicago, Rock Island and Pacific Ry. Co., supra; Hocking Domestic Coal Co.* v. *K. & M. Ry. Co., supra*.

## III

The Government's contention notwithstanding, the Commission's order is addressed to the Stock Yards and impairs the Stock Yards' property rights in Track 1619. It is physically impossible for the Stock Yards to comply with the Commission's order. It is legally impossible for the railroads to comply—to do so would subject them to liability for damages, to suits for injunctions, and to possessory actions. *Secombe* v. *Milwaukee, etc., R. Co.*, 23 Wall. 108; *Salt Lake City* v. *Hollister*, 118 U.S. 256; *Wagner* v. *Railway Co.*, 38 Oh. St. 32. The Commission itself has held that a carrier is not guilty of a violation of the Act in failing to

operate over industrial sidetracks where legal or physical obstructions prevent such operations, and that the Commission will not order such operation under these circumstances. *Limits Industrial Building Corp. et al.*, v. *B. & O. Co.*, 258 I.C.C. 438; 441; *Rex Jellico Coal Co. et al.*, v. *Louisville & Nashville Ry. Co.*, 237 I.C.C. 67, 70-71; *Certain-Teed Products Corp.* v. *C. R. I. & P. Ry. Co. et al.*, 68 I.C.C. 260, 262.

ARGUMENT

The fundamental error committed by the Commission in this case is that it undertook to strip the Stock Yards of its rights as owner of Track 1619 in excess of any authority conferred upon the Commission by the Interstate Commerce Act, as amended, and thus deprived the Stock Yards of its property without due process of law. The Commission has asserted its *regulatory* power, not only over common carriers subject to the Act, but also over a non-carrier upon whom the Act in no wise imposes any responsibilities under the circumstances here disclosed. It has claimed jurisdiction over the person of the non-carrier solely by virtue of the provisions of Section 2 of the Elkins Act (49 U.S.C. 42). In so doing, the Commission has misconceived the powers imposed upon it, has departed from its own prior conceptions of its powers, and has injected a new and revolutionary principle into our system of law.

No question is here presented of the jurisdiction of the Commission over the persons of the common carriers by rail who are appellees in this proceeding, although, quite aside from the question of its jurisdiction over such carriers, the Commission's

order was obviously invalid even as to them for the reason that such common carriers have been ordered to perform acts which it is legally impossible for them to do.

The appellants, throughout the proceedings before the Commission, before the court below, and in their briefs in this Court, have wholly misconceived the basic issue here presented by ignoring the elementary principle that the Commission derives no authority whatever with respect to common carriers or non-carriers by virtue of Section 1(3)(a) of the Act (49 U.S.C. 1(3)(a)). That section merely includes, by express reference, certain persons within the concept of "common carriers," and defines certain facilities included in the terms "railroad" and "transportation." The Commission's authority, if it exists at all, is contained elsewhere in the Act. In *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, at 443, this Court said:

> "* * * it is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carrier shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers contrary to the truth. * * *"

Appellants have further mistated the case as one involving the conclusiveness of the Commission's findings of fact. Appellants persist in ignoring the basic theory upon which this litigation was instituted and conducted, and as it was accepted and decided by the court below, namely: that the

Commission had no jurisdiction either over the person of the Stock Yards or over its legal right to control the use of its private property. That the doctrine of administrative finality of fact is inapplicable in the present posture of the case at bar, see Note 9, *supra*.

## I

### THE STOCK YARDS, AS OWNER OF TRACK 1619, HAS THE RIGHT TO LIMIT THE USE OF THE TRACK TO SUCH TRANSPORTATION THEREON AS DOES NOT INTERFERE WITH ITS OWN BUSINESS

The Commission's order (R. 65-66), if valid, deprives the Stock Yards of its rights as owner of Track 1619 in a manner not heretofore countenanced in the law and establishes a new mode of acquisition of property by common carriers for railroad purposes in addition to those modes heretofore recognized. The Commission ordered the Stock Yards, a non-carrier, and the common carriers by rail to do two things: (1) to cease and desist, and to abstain from refusing to deliver to the side track of Swift & Company, its shipments of livestock carried over the lines of the common carriers, and consigned to the plant of Swift & Company; and (2) to establish and put in force, and maintain in force thereafter, a schedule providing for the delivery to the side track of Swift & Company in Cleveland, Ohio, of its interstate shipments of livestock carried over the lines of the common carriers and consigned to Swift's plant at Cleveland.

It is plain that the order, in terms, is incapable of being performed by the Stock Yards, since the Stock Yards has never refused to deliver livestock to the side track of Swift & Company at its plant

in Cleveland, Ohio. It has never engaged in that kind of business. Equally difficult it would be for the Stock Yards to establish and maintain schedules providing for the delivery of livestock to the plant of Swift & Company, as it is not a common carrier by rail with the necessary facilities to maintain such schedules. The obvious intent of the Commission by issuing its order of May 3, 1946 (*the statements in the Government's brief to the contrary notwithstanding*), was to subordinate the rights of the Stock Yards as owner of its track to the use of the common carriers by rail for the benefit of Swift & Company and other shippers, in spite of the fact that no action has ever been taken by the Stock Yards or by the common carriers which deprives the Stock Yards of the right to limit the use of this track to such transportation thereon as does not interfere with its own business.

A. *The Stock Yards' ownership of Track 1619 is undisputed.*

The cavalier fashion in which the Commission summarily treated the property rights of the Stock Yards cannot be condoned by vague references to the National Transportation Policy declared by Congress (Act of September 18, 1940, 54 Stat. 898; quoted in Appendix A of the Government's brief). As this Court said in *Producers Transportation Co.* v. *Railroad Commission of California*, 251 U.S. 228, 230-231:

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the pub-

> lic, the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment. *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 593; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 595; *Associated Oil Co.* v. *Railroad Commission*, 176 California 518, 523, 526. And see *Munn* v. *Illinois*, 94 U. S. 113, 126; *Louisville & Nashville R.R. Co.* v. *West Coast Naval Stores Co.*, 198 U. S. 483, 495; *Weems Steamboat Co.* v. *People's Steamboat Co.*, 214 U. S. 345, 357; *Chicago & Northwestern Ry. Co.* v. *Ochs*, 249 U. S. 416, 419-420."

It is equally true that no order of the Interstate Commerce Commission can convert the private property of the Stock Yards into a public utility or make the Stock Yards subject to regulation by the Commission, for that, too, would be taking private property for public use without just compensation in violation of the due process clause of the Fifth Amendment to the federal Constitution.

Indeed, it comes as a surprise to learn in the Government's brief (p. 51) that the Government undertakes to castigate the court below for being "engrossed" with the property rights of the Stock Yards in the case at bar. There is of course no inconsistency between the preservation of private property rights and the fostering of a National Transportation Policy within the framework of the Constitution.

The vacillating arguments successively presented by the appellants in the case at bar in the various proceedings before the Commission, before the court below, and in their brief before this Court have been of such character as to show that, by now, the Government and Swift & Company are evidently fearful of the consequences which would ensue from adhering to the position originally asserted before the Commission to the effect that the track had been dedicated to a public use. That was the argument made before the Commission. Thus, counsel for Swift & Company asserted to the Commission at the time of the oral argument on June 4, 1943 (R. 473-474) as follows:

> "Mr. Rynder. I have some ideas upon that, Mr. Commissioner. I believe that that track has been dedicated to a public use for so many years that the stockyards *has lost the right to treat it as its own property.* That would be upon the theory of dedication.
>
> "I have searched those cases pretty well. I have mentioned some of them in my exceptions and one of them says distinctly that a dedication of property for station purposes for a certain period prevented that owner from taking back the property and selling it." (Emphasis supplied.)

Again, at the second oral argument before the Commission on October 3, 1945, counsel for Swift & Company, speaking on the same subject, had the following colloquy with members of the Commission (R. 514):

> "In other words, once that track has been put in the public service—and it has been

put into that service for something over 35 years and is still in the public service—it becomes a part of the railroad and must be operated by the railroad under all its obligations as a common carrier, both as to the duties required to be performed and as to the avoidance of discrimination or undue prejudice.

"Commr. Barnard. Without the railroad having any interest in it financially at all?

"Mr. Rynder. Oh, it has an interest in it financially. It enables it to serve seven industries which give it business.

"Commr. Barnard. I am not speaking of that kind of interest, I am speaking of ownership interest.

"Mr. Rynder. It has no ownership, no, but it is maintained and it has been maintained for 35 years.

"Commr. Barnard. You think that is a dedication under the lease arrangement made with the New York Central? Do you think that amounts to a dedication?

"Mr. Rynder. I hope to show you in one case it certainly has been so held."

Not only was the contention made to the Commission in oral argument on the two occasions above mentioned that Track 1619 had been *dedicated* to a public use, but Swift & Company made a principal point of this contention in its briefs before the Commission. At page 101 of its brief dated October 2, 1944, Swift & Company asserted that "The track and ground thereunder were unquestionably dedicated by the Stock Yards Company to a public service." In that brief, it also undertook to review the authorities relative to the doctrine of the "dedication of property to a public

use." And in its brief before this Court, Swift & Company glibly and irrationally says that the Stock Yards "appropriated Track 1619 to the use of New York Central." (Swift brief, p. 52.)

In the actions in the court below, all of the appellants herein took the position that Track 1619 had been devoted to a public use.[11] It appears that

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[11] Cases relied upon by appellants in the court below, as in this Court, to sustain their contention that Track 1619 was devoted to a public use, are not cases involving the law of dedication, but, on the contrary, are cases such as *Union Lime Co.* v. *Chicago & Northwestern Ry. Co.*, 238 U. S. 211, involving eminent domain proceedings by a railroad to take property for the building of a spur. In the *Union Lime Co.* case, the Court correctly held that such a taking was for a public purpose. See the discussion at 233 U. S. 221. This is, of course, a far cry from holding that the owner of the land over which the spur was laid had devoted it to a public use so as to justify its utilization without the necessity of taking appropriate condemnation proceedings. It is to be observed that in the *Union Lime Co.* case, the Court pointed out that, "* * * there is a clear distinction between spurs which are *owned* and operated by a common carrier as a part of its system and under its public obligation and merely private sidings." (Emphasis supplied.)

The appellants have also relied at one time or another upon *Alton R. R. Co.* v. *Illinois Commerce Commission et al.*, 305 U. S. 548, to show that Track 1619 has been devoted to a public use. This, also, is not a dedication case. The Court merely held there that the Illinois Commerce Commission had the right to refuse to permit the railroad to abandon an industrial side track which had been constructed in part across the public streets and private lands for the *general* use of the public so as to serve various industries.

Examination of the authorities relied upon by appellants will disclose that, in no instance, have they cited any

now, in its brief filed in the case at bar, the Government disclaims any knowledge of whether Track 1619 was ever dedicated to a public use, conceding that this is "a question of Ohio real property law" (Government's brief, page 19). Instead, the Government apparently falls back for its chief reliance to sustain the action of the Commission upon the pervasive error made by all of the appellants throughout these proceedings and by the Commission to the effect that, by the magic of Section 1(3)(a) of the Interstate Commerce Act and because of the contract respecting its limited use between the Stock Yards and one of the common carriers by rail herein, Track 1619 has become a part of the New York Central's railroad system so as to justify an order of the Commission striking down the rights of the Stock Yards as the owner of that track.

It seems to be conceded now that the track is owned by the Stock Yards. At all events, the Gov-

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decision of this Court or of any other court in which the exact issue here involved was considered, but, on the contrary, have relied upon cases of the character mentioned, including, besides those already indicated, *Hairston* v. *Danville and Western Ry.*, 208 U. S. 598, 608 (condemnation); *Milheim* v. *Moffett Tunnel District*, 262 U. S. 710 (taxation); *F. C. Ayres Mercantile Co.* v. *Union Pacific Ry.*, 16 F. (2d) 395 (easement by prescription), and *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467. See, also, notes 25 and 31, *infra*. In thus tearing away discussions by this Court from their contexts and attempting to apply them to issues with which the Court was not concerned, the appellants and the Commission have fallen into error against which this Court has frequently and recently warned. *Atlantic Coast Line R. R.* v. *Phillips*, 332 U. S. 168.

ernment apparently takes the position that ownership is immaterial for purposes of present decision —a position which Swift & Company hesitates to adopt. (Swift brief, pp. 27, 45.) The rationale of this position is obscure. If, as is apparently conceded, the Stock Yards is the owner of Track 1619, it has a clear right to use it or to limit its use by others so as not to interfere with its own business.

In this connection, it must not be forgotten that the Stock Yards is performing an important function and service to the shipping community interested in the movement of livestock. It is subject to the regulatory jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act of 1921, as amended (7 U.S.C. 181 *et seq.*), insofar as its stockyards operations are concerned. The rates which the Stock Yards charges to patrons for the use of its facilities are fixed by the Secretary upon the basis of a valuation of the properties of the Stock Yards and are designed to secure to it a specified return thereon. The Stock Yards is thus under a duty to the farmers and other patrons who utilize its facilities to see that its physical assets and financial resources are maintained; and it is under a like duty to such patrons to maintain the integrity and continuity of its business. To compel the Stock Yards to permit the use of its sidetrack and the land occupied thereby for delivery of livestock to Swift & Company would amount to taking a strip of very valuable land fronting on West 65th Street, without just compensation and without due process of law. The compelled use of the Stock Yards' track and property would, moreover, deprive it of revenue.

The Stock Yards is engaged in the business of handling, storing and delivering livestock, including livestock consigned direct to Swift & Company and other packers, in connection with which it has provided and maintains pens, alleys, railroad sidetracks, and other necessary facilities, and for the use of which it derives revenue based upon rates approved by the Secretary of Agriculture or upon agreements covering non-stockyard services. As a public stockyard it must provide facilities to accommodate all reasonable peaks of volume of livestock received from the railroad company for delivery to packers through its stockyards. If livestock should be diverted from the pens of the Stock Yards for delivery by the use of its sidetrack, the Stock Yards would then be deprived of compensation for the pen facilities, which would as a consequence remain idle. The Stock Yards could not long remain in business under such circumstances.

The case at bar presents a novel situation in which a great public service organization is ordered, without authority in law, to permit its property to be used so as to cause its business to dwindle away, thereby rendering it less efficient, and ultimately unable to perform its stockyards services for its livestock market patrons.

The invalidity of the Commission's order fundamentally stems from the fact that, without any lawful basis of regulatory authority over the Stock Yards under the circumstances here disclosed, the Commission has ordered the Stock Yards to give up its property for the benefit either of the common carriers by rail or Swift & Company, depending upon the point of view one takes, without such

property having been purchased or acquired by condemnation proceedings, which are the only lawful methods available for the taking of such property.[12]

If, as held by the Commission (R. 38), and as contended by the appellants, the track has become part of the system of the New York Central Railroad Company so that the Stock Yards may no longer exercise the usual control of an owner with respect to his property, such result must have been accomplished by virtue of some action heretofore taken by the Stock Yards with respect to this property. The record fails utterly, however, to show any such action on the part of the Stock Yards.

B. *The Stock Yards has in no manner surrendered to the railroad its right to control the use of Track 1619.*

The record shows that Track 1619 was built upon lands of the Stock Yards by virtue of an agreement made between the Stock Yards and the Big Four in 1899. The Stock Yards bore the cost of constructing this track. It was at that time and has ever since remained the absolute owner thereof and of the land upon which it is located (R. 347-349). The parties to the 1899 agreement confirmed this agreement, if any confirmation were necessary, when, a quarter of a century later, they

[12] The Stock Yards does not even concede that its Track 1619 could be taken from it by eminent domain proceedings, the Government's statement to the contrary notwithstanding. The Stock Yards' position is simply that, if its track may be taken away from it at all, the prescribed procedure must be by way of appropriation proceedings.

entered into the agreement of June 16, 1924 (R. 339-341), which superseded the 1899 agreement. It was there confirmed (R. 340) that

> "The Industry does and shall continue to own the following tracks or portions thereof:
>
> "(a) The about 1,619 feet of Track No. 245 extending from the Railroad right of way southwardly to the point of Big Four ownership in said track."

As amended effective February 1, 1935 (R. 339) the common carrier was accorded the "free and uninterrupted use, except for competitive traffic a charge for which use shall be the subject of a separate agreement," of Track 1619 located on the land of the Stock Yards Company. Thus the Stock Yards, as recognized by the court below (R. 150 *et seq.*), has been careful throughout the years to preserve its ownership and control over its track. It is clear that under the governing law no property interest in the track in question passed to the railroad carrier so as to preclude the Stock Yards from exercising full control over its track by excluding therefrom any and all user by the railroad or by Swift & Company.[18]

As conceded by the appellants in their brief (see Government's brief, page 19), since this track is located wholly within the State of Ohio, it is pertinent to look to the Ohio law to determine whether

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[18] The Commission itself evidently was of the opinion that the Stock Yards had the right to altogether withdraw the use of its track by anyone (R. 38; R. 40). See also the opinions of the dissenting Commissioners (R. 45; R. 39).

any property interest in such track has ever passed so as to preclude the Stock Yards from exercising the usual powers incident to ownership.[14] In Ohio, a railroad can acquire property in only three ways: by gift, by conveyance, or by appropriation in accordance with statute. *Todd* v. *Pittsburg*, 19 Oh. St. 514.[15]

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[14] The law of Ohio upon this subject, as construed by its courts, is governing here. *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 68 S. Ct. 167, 169. See also *Louisiana ex. rel. Francis* v. *Resweber*, 329 U. S. 459; *Huddleston v. Dwyer*, 322 U. S. 232; *Minnesota* v. *Probate Court*, 309 U. S. 270; *Morehead* v. *New York ex. rel. Tipaldo*, 298 U. S. 587; *Wilson* v. *North Carolina*, 169 U. S. 586.

[15] Section 8761, Page's *Ohio General Code* (Annotated), provides that both domestic and foreign railroads may acquire lands by *purchase* or *gift* necessary to secure rights of way. Also, Ohio has provided a complete and comprehensive procedure to be followed by corporations authorized to *appropriate private property*. Sections 11038 *et seq.* of Page's *Ohio General Code* (Annotated). The right to appropriate private property in accordance with such procedure has been conferred upon railroad corporations in Ohio, whether such railroad corporations are foreign or domestic companies (Sections 8754, 8759, 8760, 8763, 8764, and 8767 of Page's *Ohio General Code* (Annotated)). Under the procedure provided by Sections 11038 *et seq.*, *supra*, appropriations are only authorized when the corporation is unable to agree with the owner as to the compensation to be paid for the property or easement or interest therein sought to be appropriated or when the owner is unknown (Section 11039). The procedure calls for the institution of proceedings by the filing of a petition in specified Ohio courts (Section 11042). The court is authorized to make certain preliminary determinations as to the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation (Section 11046). Provision is also made for a jury trial (Sections 11047 and 11048). Other provisions deal with other incidents to the procedure.

The methods provided are the exclusive methods in Ohio by which railroad corporations, whether domestic or foreign, may obtain property for railroad purposes.[16]

In the case at bar, the railroad has never taken any statutory proceedings in Ohio to appropriate Track 1619 so as to acquire an interest therein by virtue of this method. Furthermore, it is settled in Ohio that a railroad corporation cannot acquire property by way of dedication. In *Todd* v. *Pittsburg*, 19 Oh. St. 514, the Supreme Court of Ohio said, at page 524:

> "* * * A dedication is an appropriation of lands to a *public* use. In such case the direct beneficiary is the public. Wherever the legal title may be vested, the right to the use is in the public. But the defendant here is a private corporation. Its road, its rights of way, its depots, its offices, its rolling stock, etc., are all, not public, but private property. They are owned by the defendant. But among the various methods by which private property may be acquired, *dedication* is not one. * * *" (Emphasis supplied.)

It is thus perfectly clear that the New York Central has no title to or interest in Track 1619 by virtue of any of the recognized modes available to it for acquiring property in the State of Ohio. Its sole right to operate over Track 1619 stems

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[16] *Wagner* v. *Railway Co.*, 38 Oh. St. 32; *Henry* v. *The Columbus Depot Co.*, 135 Oh. St. 311; *Cincinnati* v. *Railroad Co.*, 88 Oh. St. 283; *Powers* v. *Railway Co.*, 33 Oh. St. 429; *Toledo & Wabash Ry. Co.* v. *Daniels et al.*, 16 Oh. St. 390.

from its contract with the Stock Yards,[17] and that right contains a limitation on the use of the track for livestock purposes which it was lawful for the Stock Yards, as the owner of Track 1619, to impose.

It is no answer to this to say, as do the appellants in the case at bar, that the restricted use which the Stock Yards permitted to be made of its property is void as against public policy in that it disables the common carriers from performing duties imposed upon them by law. Indeed, this seems to be the heart of the argument made by the appellants, as they have abandoned all prior attempts to show that there has been a dedication of the property in question to a public use. But the fallacy with this reasoning lies in the circumstance that if, assuming, *arguendo*, such limitation is void, then the common carriers have no right at all to operate

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[17] No authority has, of course, been conferred upon the Interstate Commerce Commission to exercise, on behalf of the Federal Government, any power of eminent domain in a situation such as that presented in the case at bar, even assuming that Congress has the power to exercise the power of eminent domain in such a situation. In proper cases, in connection with the execution of powers conferred upon it by the Constitution, the Congress has exercised this power. *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 568; *Shoemaker* v. *United States*, 147 U. S. 282. Even where the Congress has thought it necessary to authorize the Commission to order the use by one carrier of the terminal facilities of another carrier, it has enacted specific legislation to this end and provided a careful procedure to be followed in connection therewith. See Section 3(5) of the Act empowering the Commission to require a common carrier by rail owning terminal facilities to permit the use of such facilities by another carrier upon the fixing of compensation therefor by the Commission in the absence of an agreement by the carriers.

over Track 1619 for any purpose. Thus, since the railroad's right to enter upon the lands of the Stock Yards and to use its track rests solely upon the limited use accorded to it by the trackage agreement—an arrangement which Swift & Company has long recognized as beneficial to it—either that contract is valid in its entirety and the railroad must use Track 1619 solely in accordance with the contract, or the contract is invalid and the railroad has no right whatever to operate upon the track. As this Court said in *Union Pacific Ry. Co.* v. *Chicago, etc., Ry. Co.*, 163 U.S. 564, at page 583, when considering a similar trackage agreement to the one here involved, except that it was between two carriers, where the owning carrier had limited the use which it permitted the other carrier to make of its property:

> "* * * And throughout the whole contract there does not appear to be a single provision which looks to any actual possession by the Rock Island of any of the Pacific property beyond that which was involved in its trains being run over the tracks under the direction of the other company. The contract in this regard was really an agreement for trackage rights, for running arrangements, a 'terminal contract' with compensation on a 'mileage' or 'wheelage basis,' rather than a lease."

The contention that the trackage agreement disables the common carrier from performing duties imposed upon it by law is also based upon a fallacy, immediately apparent, in that it assumes a duty upon the part of the carrier to operate over Track 1619 in violation of its agreement. It would ap-

pear to be elementary that, if the carrier does not control the full use of Track 1619, it cannot be required to operate over it in a manner consistent only with such full right of user. Both the Commission and the courts have repeatedly held that, under these trackage agreements, the carriers, having only limited rights thereunder, are under no duty by virtue of the Interstate Commerce Act, or otherwise, to use such track in contravention of their agreements and that such agreements do not disable the carriers from performing duties imposed upon them by law.[18]

C. *The Stock Yards has not in any manner surrendered its control over Track 1619 to the public, including Swift & Company.*

Not only does the record show that the Stock Yards has retained the right, as against the New York Central Railroad, to control the use of its track, but also that the Stock Yards has not dedicated or otherwise devoted its Track 1619 to the public, including Swift & Company, so as to preclude it from exercising full control over its property in accordance with its own business interests.

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[18] *Rock Island Ry.* v. *Rio Grande R. R.*, 143 U. S. 596, 609, 612; *Union Pacific Ry.* v. *Chicago, etc. Ry.* 163 U. S. 564, 581, 593, 589, 594, 603; *K. & M. Ry.* v. *The Public Utilities Commission of Ohio*, 96 Oh. St. 414; *Sholl Brothers* v. *The Peoria and Pekin Ry.*, 276 Ill. 267, 271, 273, 274-276; *Alabama Central R. R.* v. *Alabama Public Service Commission*, 200 Ala. 536, 537, 538; *Bedford-Bowling Green Stone Co.* v. *Oman*, 134 Fed. 441; *Alford* v. *Chicago, Rock Island and Pacific Ry.*, 3 I. C. C. 519, 522, 526-529; *Hocking Domestic Coal Co.* v. *K. & M. Ry.*, 44 I. C. C. 392, 396 *et seq.*, *Chicago, M., St. P., and P. R. Co. Trustees Operation*, 247 I. C. C. 1, 7; *Texas and N. O. R. Co. Operation*, 249 I. C. C. 595; *Abandonment by Chicago, R. I. & Pacific Ry.*, 131 I. C. C. 421.

One is met at the threshhold of this case with the fact that Swift & Company which, for years, has directly reaped the benefits of the trackage agreement between the Stock Yards and the railroad company, is now urging that the contract is illegal as opposed to public policy because the use permitted by the Stock Yards and enjoyed by Swift & Company is not all the use that Swift & Company would now like to have for its present business purposes. Swift & Company and the other appellants now attempt to make it appear that the restriction on the use of Track 1619 for the movement of livestock, except upon the terms proposed by the Stock Yards, is something new. The record shows, without contradiction, that Swift & Company has always, with the exception presently to be noted, received direct shipments of livestock through the Stock Yards. This was the condition prevailing and understood in 1910 at the time the private sidetrack of Swift & Company was built.

Throughout the years that followed, the practice of taking direct shipments of livestock through the Stock Yards prevailed and has continued since to be the rule. As long as direct shipments of livestock were taken from the Yards, the Stock Yards had no occasion to take any positive steps to preserve its business interests. Until 1930, the use made of Track 1619 was a limited use made by the railroad common carrier pursuant to its trackage agreement with the Stock Yards. Swift & Company, in that year, began to cause to be moved substantial volumes of livestock over Track 1619, thus bringing about a change in the conditions.

The upsetting of these conditions by Swift &

Company resulted in the amendment effective February 1, 1935, to the June 16, 1924, agreement, by which the Stock Yards, in effect, told the railroads that if Track 1619 was to be used for the movement of livestock—a use to which it has never been put prior to the action of Swift & Company between 1930 and 1935—a separate agreement would have to be made providing for adequate compensation to the Stock Yards for such new type of use of its track. Under these circumstances, how can it be said that the Stock Yards has ever, in any manner, surrendered its control over Track 1619 to the public, including Swift & Company, so as to make it *unlawful* for it to use its property to foster its own business or to give the Commission any jurisdiction over it?

If the public has such interest in this track as to preclude the Stock Yards from exercising its powers of ownership, it must be because the Stock Yards has dedicated it to the public use either by statutory or common law dedication.

In view of the decisions of this Court, of the Supreme Court of Ohio, and of authorities elsewhere,[19] it cannot be seriously contended that Track 1619 of the Stock Yards has ever been dedicated or devoted to the public use.

Examination of the Ohio cases cited in the last

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[19] *City of Cincinnati* v. *The Lessee of White*, 6 Peters 431, 438, 440; *Morgan* v. *Railroad Co.*, 96 U. S. 716, 720, 722; *The Lessee of the Incorporated Village of Fulton* v. *Mehrenfeld*, 8 Oh. St. 440, 444, 445, 446; *Railroad Co.* v. *The Village of Roseville*, 76 Oh. St. 108, 115, 117; *Wisby* v. *Bonte*, 19 Oh. St., 238, 245; *Todd* v. *Pittsburg*, 19 Oh. St. 514, 523; *Penquite* v. *Lawrence*, 11 Oh. St. 274, 276; *Thompson On Real Property* (permanent edition, revised and enlarged), Sec. 481, 482-483, 486, 487, 490.

footnote reveals that courts of that state, in line with the authorities elsewhere, have held that it is the established law in Ohio that dedication is the appropriation or gift of land to some public use made by the owner of the fee and accepted for such use by or on behalf of the public and that, in Ohio, there are two classes of dedication:

(1) Property may be passed by virtue of *statutory dedication* which must be made in compliance with statutory authority and requires no acceptance or assent on the part of the public except such as is provided by statute. *The Lessee of the Incorporated Village of Fulton* v. *Mehrenfeld*, 8 Oh. St. 440, 444; *Wisby* v. *Bonte*, 19 Oh. St. 238, 245; *Penquite* v. *Lawrence*, 11 Oh. St. 274. In Ohio, the statutes provide for such a method of statutory dedication, for example, with respect to public streets and alleys. Page's *Ohio General Code* (Annotated), Sec. 6886. The courts of Ohio, however, have held that the statutory scheme must be followed in order to sustain statutory dedication. *Penquite* v. *Lawrence*, 11 Oh. St. 274, 276. The record in the case at bar does not, of course, show that the Stock Yards has ever made a statutory dedication of Track 1619 to the public in accordance with the law of Ohio.

(2) The Ohio courts, on the other hand, have held that property may pass to the public by a *common law dedication* which, as stated by the Supreme Court of Ohio in numerous decisions, is one made without compliance with statutory requirements and constitutes an offer on the part of the owner of real property to dedicate it to the pub-

lic use, followed by an acceptance of such offer by the public.[20]

The elements of a valid common law dedication are lacking in the case at bar for many reasons. The careful retention of control by the Stock Yards of its track throughout the years, by which it has been kept free from the movement of livestock, conclusively dispells any notion that the Stock Yards has ever manifested any intention to permit the free public user of its track.

In view of this elemental circumstance, it is difficult to see by what process of reasoning the Commission concluded (R. 38) that, by its trackage agreement with the New York Central Railroad Company, the Stock Yards was contracting for the public to use its track without restriction.

From the standpoint of Ohio law relative to dedication, there has also never been any acceptance by the general public of this particular track, so that this element, too, of a valid common law dedication in that jurisdiction is lacking. Mere permissive use of the track does not show either intention or acceptance in the sense in which such term is used in the authorities dealing with dedication. *Railroad Co.* v. *The Village of Roseville*, 76 Oh. St. 108, 115, 116, 117, 118; *Thompson on Real Property*

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[20] There is no contention by the appellants in the case at bar, as the Stock Yards understands it, that the public has ever obtained a right to use Track 1619 by prescription under the Ohio law. The Supreme Court of Ohio has pointed out that title by public prescription in Ohio can only be shown by *adverse* user by the public, under a *claim of right*, and unopposed for a period of twenty-one years. *Railroad Company* v. *The Village of Roseville*, 76, Oh. St. 108.

(Permanent Edition revised and enlarged), Sec. 487.

The Supreme Court of Ohio and this Court, as well as the authorities elsewhere, have uniformly held that a common law dedication really acts by way of estoppel on the owner and prevents the owner from asserting his rights because of equitable considerations.[21] It becomes pertinent, therefore, to determine whether there is any element of estoppel in the case at bar so as to prevent the Stock Yards from asserting full control as owner.

Swift & Company has attempted to make it appear throughout this proceeding that the Stock Yards, by its action late in 1934, disrupted a long-continued practice of moving livestock over this track to Swift & Company's siding. The truth in this connection is otherwise. Swift & Company, together with the other packers having sidetrack connections dependent upon Track 1619, have continuously received their direct shipments of livestock through the facilities of the Stock Yards. To guard against such a contingency as actually occurred, the Stock Yards had always retained the contract right to cancel this contract for the use

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[21] "* * * a dedication of ground to public uses at common law acts by way of estoppel *in pais* of the owner, rather than as a *grant* or the transfer of an interest in the land. *City of Cincinnati* v. *White*, 6 Pet. S. C. Rep. 582; *Town of Paulet* v. *Clark*, 9 Cranch 202; *Hunter* v. *Trustees of Sandy Hill*, 6 Hill 407; *Curtis* v. *Keesler*, 14 Barb. 521." (*The Lessee of the Incorporated Village of Fulton* v. *Mehrenfeld*, 8 Oh. St. 440, 444). This Court has also held that common law dedication acts by way of estoppel on the owner, rather than as an actual conveyance of a property interest or an easement to the public by way of grant, differing, in this respect, from statutory dedication. *Morgan* v. *Railroad Co.*, 96 U. S. 716, 720 *et seq.*

of its Track 1619. When, therefore, between 1930 and 1935, Swift & Company attempted to disrupt a long-settled custom in that area in receiving direct shipments of livestock through the yards, the Stock Yards merely exercised its lawful right, which it had constantly reserved for precisely such a contingency as this,[22] when, on December 31, 1934 (R. 423) the Stock Yards informed the New York Central Railroad Company that it would cancel the agreement. Thereafter, as a matter of accommodation to the other industries in the stock yards district, the Stock Yards Company permitted

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[22] Reference to the agreement of June 16, 1924 (Ex. 9, R. 339), shows that the Stock Yards had the right to terminate such an agreement upon thirty days' notice. By such agreement, it also permitted the Railroad to use Track 1619 but, in this connection, it must be remembered that such track *was not being used* for the delivery of livestock to Swift and Company or to anyone else, nor had it been so used since the inception of the track arrangements in 1910. When, therefore, as a result of Swift's action between 1930 and 1935, its own property was used to its detriment, the Stock Yards merely exercised the right which it had reserved in the agreement of June 16, 1924, to cancel the entire use of the track. The Commission, in the case at bar, indicated in two places that it was not prepared to say that the exercise of such right was unlawful (R. 38, R. 40). The amendment effective February 1, 1935 (Ex. 9, R. 339), in effect, permitted the continued use of the track, except for livestock which could only be moved over the track if a separate agreement as to the charge between the Stock Yards and the carrier was made. The real effect of this agreement was to change nothing which had theretofore taken place. *E contrario*, the effect of the arrangement was to preserve the *status quo* which Swift & Company was attempting to upset. In this posture of the case, the proceeding by Swift and Company presents the novel situation in which the company is attempting to claim rights under the Interstate Commerce Act, as amended, upon the basis of an alleged change in a custom which never existed.

the agreement to continue with respect to the movement of commodities other than livestock, but persisted in asserting its lawful right to confine the use of the track to non-competitive traffic. (Ex. 48, R. 437 *et seq.*) The New York Central Railroad Company thus obtained continued use of the track upon the best terms which it was possible to obtain from the Stock Yards. It thus clearly appears that Swift & Company, as well as the other packers having sidetrack connections dependent upon Track 1619, were directly benefited by the arrangement made by the railroad company with the Stock Yards. *That arrangement, in effect, merely continued for the future what had been the practice in the past with respect to the use of that track before Swift & Company unsuccessfully sought to upset that practice.*

The facts show nothing inequitable in the existing arrangement but, on the contrary, they conclusively demonstrate that Swift & Company has invoked the jurisdiction of the Commission in this instance to establish its statutory right to something which never existed.

It is apparent, therefore, that Track 1619 has not been dedicated to the public use by either a statutory or common law mode of dedication.

D. *The Stock Yards, as owner of Track 1619, is entitled to condition its use.*

Even if the elements requisite to a common law dedication had been established by the facts of record, the Commission would not have been at liberty to ignore the condition accompanying such dedication. The public could not, in any event,

dictate the terms of the grant to it. It would have to accept its burdens along with the benefits. It is well established that a dedication of private property to public use may be made *cum onere*. *Lynchburg Traction & Light Co.* v. *Lynchburg*, 142 Va. 255; *State* v. *Hoboken*, 59 N. J. Law 383; *Village of Bradley* v. *New York Central Railroad Company*, 296 Ill. 383; *City of Noblesville* v. *Lake Erie and W. R. Co.*, 130 Ind. 1; *Arn* v. *Chesapeake & O. Ry. Co.*, 171 Ky. 157; *Oklahoma, etc., R. Co.* v. *Dunham*, 39 Tex. Civ. App. 575; 1 *Elliott On Roads and Streets* (2nd Ed.), Sec. 148. These authorities clearly show that the owner may grant whatever estate he sees fit and may annex conditions and limitations to his grant at his pleasure, provided such limitations and conditions are not inconsistent with the dedication and will not defeat the operation of the grant. Subject to this limitation, the dedication must be accepted "secundum forum doni." Universal recognition of this salutary principle has been attained since to hold otherwise would be, in effect, to compel the owner to part with his property on terms different from those prescribed in his grant.[23]

In the case at bar, it cannot be said that there would be any inconsistency in granting to the public the privilege of user of the track for certain purposes and, at the same time, preserving the

[23] Viewed from another aspect, the result is the same. Thus, where property is dedicated for a certain purpose, it must be used solely for the purpose for which it is dedicated. *Jones Island Realty Inc.* v. *Middendorf*, 191 La. 456, 461. Furthermore, the same principle holds good with respect to the establishment of prescriptive rights, for a prescriptive right may be acquired in a conditioned use. *Faulkner* v. *Hook*, 300 Mo. 135.

rights of the donor with respect to the limitation of its use for other and unrelated purposes in order to effectuate the business purposes of the donor.

It is clear, therefore, that, if the case at bar were viewed, *arguendo*, as one of dedication or devotion of the track to public use, the public would have to accept that which had been dedicated or devoted and would have no lawful right to demand more. The donee cannot dictate the terms of the gift; it may accept or not, but by unconditional acceptance the donee thereby agrees to perform the conditions annexed to the gift. *Thompson on Real Property* (permanent edition, revised and enlarged), Sec. 490.

If the Commission and the appellants were otherwise correct in their position with respect to the devotion of Track 1619 to public use (which, of course, they are not), acceptance of the principle proposed by them would establish a novel and unprecedented rule of law by which the owner of property would be unable to give away or to sell a part of that property and retain a part. Yet, this is the inevitable result of the principle proposed by the appellants. By ignoring the limitations or conditions which were placed on the use of Track 1619 by its lawful owner, the appellants have escaped coming to grips with the pervading error in their reasoning.

The record in the case at bar is barren of any fact which would show or tend to show that the Stock Yards has ever done anything or has ever acquiesced in anything which would limit its right to restrict the use of Track 1619 to such transpor-

tation thereon as does not interfere with its own business. The Commission, in its report of May 3, 1946 (R. 28), does not point to any factual circumstance which would restrict the right of the Stock Yards to exercise the normal power of the owner of property, nor do the appellants point to any such fact in their briefs. On the contrary, the sole reliance of the appellants in the case at bar is based upon erroneous views as to the authority of the Commission under the circumstances here disclosed.

## II

### THE COMMISSION IS NOT EMPOWERED TO LIMIT THE STOCK YARDS' CONTROL OVER USE OF TRACK 1619

### A. *The Stock Yards is not subject to the regulatory authority of the Commission.*

The mere ownership of Track 1619 by the Stock Yards does not render it subject to the jurisdiction of the Commission so as to authorize that body to issue against the Stock Yards the order of May 3, 1946 (R. 65-66); nor does the contractual relation between the Stock Yards and the New York Central Railroad subject the former to regulation by the Commission. Quite aside from the fact that it is obviously impossible for the Stock Yards to comply with the terms of the order, it is conceded by the Government that the Stock Yards is not a "common carrier." Nor is it engaged in "transportation" by "railroad" within the meaning of the Interstate Commerce Act by virtue of ownership of Track 1619. Industrial sidetracks of the character of the one under consideration are commonly owned by private industries throughout the nation, and such ownership has never been

considered as rendering the owner of such facilities subject to the jurisdiction of the Interstate Commerce Commission.

*The Interstate Commerce Act does not authorize the Commission's order against the Stock Yards:* Nothing is gained by pointing, as do the appellants, to the definitions contained in Section 1(3)(a) of the Act, yet the appellants' argument is based on these definitions. Their argument has thus proceeded upon a subtle transference of concepts used in the Interstate Commerce Act from the objects to which these concepts properly pertain—the common carriers—to the Stock Yards, to which they do not apply at all.[24] The argument runs that, because "railroad" and "transportation" include not only facilities that are owned by a common carrier but also those which are the subject of

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[24] The distinction between a common carrier by railroad subject to the Act and a corporation performing the functions of the Stock Yards is clear. It was aptly stated by this Court long ago in *Gracie* v. *Palmer*, 8 Wheat. 605, 632, by Mr. Justice Johnson that:

> "The carrier may hire his vehicle, or his team, or his servant, for the purposes of transportation; or he may undertake to employ them himself in the act of transporting the goods of another. It is in the latter case only, that he assumes the liabilities, and acquires the rights of a common carrier. So, the shipowner, who lets his ship to hire to another, whether manned and equipped or not, enters into a contract totally distinct from that of him who engages to employ her himself in the transportation of the goods of another. In the former case, he parts with the possession to another, and that other becomes the carrier; in the latter, he retains the possession of the ship, although the hold may be the property of the charterer; and being subject to the liabilities, he retains the rights incident to the character of a common carrier."

a contractual arrangement between the common carrier and a third party, the duty of the carrier with respect to its operation over such contracted facilities is co-extensive with its duties in respect to facilities owned outright and fully controlled by it. Having by this argument created a "duty" on the part of the common carrier with respect to contracted facilities (by ignoring the terms of the contract), the appellants take the further step and argue that the carrier cannot enter into a contract to disable itself from performing such duty. The last argument is based upon a universally accepted rule of law,[25] but it

[25] See note 31, *infra*. *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, relied upon by the Government in its brief, has no applicability to the case at bar. In the *Mottley* case, the Court merely applied the familiar rule that a contract, valid when made, becomes unenforceable by virtue of a subsequent change in law rendering it unlawful to carry out the contract in the manner specified by its terms. As recognized at pages 41-42 of the Government's brief, the railroad in that case had contracted in 1871 to issue the Mottleys free passes for life, but later the Hepburn Act specifically forbade the further issuance of such passes (See section 1 (7) of the Act) and prohibited rate advantages different from published tariffs. Clearly, therefore, after the passage of the Hepburn Act it would have been illegal to continue to perform the Mottley contract both because of the specific prohibition as to passes and the prohibition respecting departure from tariffs. In the case at bar, however, no provision of law makes it illegal for a common carrier to enter into a contract for trackage rights such as that here involved. See authorities cited in note 18, *supra*, and discussed in text, *infra*. pp. 77-98. For similar reasons, the authorities cited on pp. 40-41 of the Government's brief are irrelevant; the principle for which they stand is inapplicable where the exercise of Governmental functions are not thwarted by contractual arrangements. In the case at bar, not only has the Congress failed to confer upon the Commission the authority to regulate non-carriers, such as the Stock Yards, but also the appellants have

only has applicability in a particular case where the carrier has, in fact, disabled itself from performing a duty. To the extent, however, that the use of contracted facilities of a common carrier is a restricted use, to that extent the common carrier has no power and, hence, no duty, to utilize the property in a manner expressly prohibited by the owner. The Commission itself in *Alford* v. *The Chicago, R. I. & Pacific Ry. Co.*, 3 I.C.C. 519, 532, rejected an argument identical with that advanced by appellants in the case at bar. In upholding the validity of a trackage agreement between two carriers, limiting the use which one of the carriers could make of the line, the Commission said that:

> "The duties of a common carrier are bounded by its rights and powers. Where there is no right or power to render a particular service there can be no duty in that respect. And there can not be unjust discrimination, nor undue preference or prejudice, in refusing a service that it has no right by statute or contract to perform.
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> * * *
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> "The respondent, under existing arrangements, has no authority to do other-

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wholly failed to show that the common carrier appellees were under a duty as to which they disabled themselves by the contractual arrangement in question. In any event, considerations such as those advanced by appellants do not furnish a basis for the order against the Stock Yards, since, if it be assumed, *arguendo*, that the trackage agreement is void either (1) because it, in some way, obstructed the assertion of a Governmental function or (2) because it disabled the carriers from performing a duty, then the legal result is that the carriers have *no right at all* to use the track (see authorities cited in note 18, *supra*), not that the Commission may assert jurisdiction over the person of the Stock Yards.

wise. The offences charged against it must be predicated of something done for others under similar conditions that is not done for the complaining party. There is nothing done for any one located on the line used under the contract that is not done for complainant. The whole force of complainant's contention is that more facilities would be afforded if respondent rendered the service in question. Conceding this to be true, the respondent explains by showing that it has no power to do so, and this answers the charge."

Congress, in defining the terms "common carrier," "railroad," and "transportation," in Section 1 of the Act, has merely said that a "common carrier" includes certain companies (pipeline companies, express companies, sleeping car companies, and persons engaged in transportation as common carriers for hire (Section 1(3)(a)). The term "transportation," for example, is employed throughout the Act in various connections: as, for instance, in the provisions relating to the transportation of commodities in which the carriers are interested (Section 1(8) of the Act), the free transportation of passengers (Section 1(7)), the discrimination and preference clauses (Sections 2 and 3), and the requirements for filing tariffs (Section 6). None of the definitions contained in Section 1 of "common carrier," or "railroad," or of "transportation," imposes, of itself, any duties upon common carriers or empowers the Commission to act. It is necessary to look to other provisions of the Act to determine the duty to be performed by "common carriers," by "railroads"

engaged in "transportation" as defined in Section 1(3)(a).

This is aptly illustrated by *Ellis* v. *Interstate Commerce Commission*, 237 U.S. 434, where the Commission sought to assert its jurisdiction over a company engaged in the furnishing of cars to carriers and to shippers by investigating the private affairs of such company. The Commission argued in that case, as do the appellants in the case at bar, that the Commission had jurisdiction in the premises because of the definitions contained in Section 1(3)(a) of the Act. The Court rejected this contention and said at page 443 as follows:

> "The Armour Car Lines is a New Jersey corporation that owns, manufactures and maintains refrigerator, tank and box cars, and that lets these cars to the railroad or to shippers. It also owns and operates icing stations on various lines of railway, and from these ices and reices the cars, when set by the railroads at the icing plant, by filling the bunkers from the top, after which the railroads remove the cars. The railroads pay a certain rate per ton, and charge the shipper according to tariffs on file with the Commission. Finally it furnishes cars for the shipment of perishable fruits, &c., and keeps them iced, the railroads paying for the same. It has no control over motive power or over the movement of the cars that it furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. *It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the*

*Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth.* The control of the Commission over private cars, &c., is to be effected by its control over the railroads that are subject to the act. *The railroads may be made answerable for what they hire from the Armour Car Lines, if they would not be otherwise, but that does not affect the nature of the Armour Car Lines itself.* The petition of the Interstate Commerce Commission to compel an answer to its questions hardly goes on any such ground." (Emphasis supplied.)

Not even all common carriers are subject to regulation, but only common carriers, among others, engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment (Section 1(1)). Thus, even where a company's status as a common carrier is undisputed, it does not follow that the company is subject to the Act, if it is not within the class of common carriers which is included. *Ex Parte Koehler*, 30 Fed. 867, 869; *The Parmelee Transfer Company Case*, 12 I.C.C. 40, 41. As the Court said in *Pennsylvania R. Co. v. P. U. Comm'n*, 298 U.S. 170, 174:

"The Interstate Commerce Act (49 U. S. C. § 1 *et seq.*) is aimed at common carriers exclusively, § 1(1), (3), and not even at all these. With exceptions plainly unre-

> lated to this case, § 1(1)(b), (c), carriers, even though common, are unaffected by the Act unless they are carriers wholly by railroad, or if partly by railroad and partly by water, are operating under a 'common control, management, or arrangement for a continuous carriage or shipment.' § 1(1)(a). * * * There are limitations, moreover, in respect of the conduct to be controlled in addition to the foregoing limitations in respect of the carriers to be regulated. * * *"

Cf. *Black and White Taxi Co.* v. *B. & Y. Taxi Co.*, 276 U.S. 518; *Del., L. & W. R.R.* v. *Morristown*, 276 U.S.182.

The fallacy implicit in the appellants' argument to the effect that, simply because the definitions in Section 1(3)(a) cover contracted facilities, thereby the Commission has regulatory control over the owners of those facilities—in the absence of explicit provisions in the Act to this effect—is immediately apparent when it is remembered that it was necessary for Congress, by special enactments for that purpose, to include express companies, pipe line companies and sleeping car companies within the term "common carrier" before such companies were considered subject to the regulatory authority of the Commission. And the Commission's lack of authority over the Stock Yards in the case at bar is strikingly illustrated in the long history of the Commission's attempts to extend its regulatory authority over the compensation which rail carriers should pay for the use of privately owned cars. In the case of *Refrigerator Car Mileage Allowances*, 232 I.C.C 276,

278-9, the Commission evidenced its incapacity over this subject without specific legislative authority:

> "However, a review of the various provisions of the law which we administer leads us to the conclusion that the Commission is without authority to pass upon or to fix the compensation paid by railroads to private-car companies for the use of equipment furnished by them directly to the railroads. The relation between such companies and the railroads, as well as the Commission's power over such private-car companies was considered by the Supreme Court of the United States in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, in connection with the law as it stood prior to the enactment of the car-service provisions in 1917. * * *
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> "It is clear from the language quoted that the Commission at that time had nothing to do with the compensation paid to private-car companies, and we do not understand that the Congress broadened our power when it passed the car-service provisions in 1917. The purpose of that legislation, as can readily be gathered from an examination of the proceedings before the Congress, was to give this Commission jurisdiction over the practices in respect to car service as between the carriers in order to obtain greater use of the equipment and thus prevent car shortages. * * *
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> "It seems certain that the Congress had in mind only the dealings between common carriers, one with another, and did not contemplate the prescription of compensation which a common carrier should pay to a

private-car company for the use of its equipment. The amount of such compensation would have no direct bearing upon the matter of car shortages, which it was the purpose of the car-service amendments to avoid or reduce. The amount to be paid under such circumstances is properly left to the judgment of the management in the same way that expenditures for equipment and maintenance are left to the discretion of the carriers, themselves. *While such expenditures, if excessive, may be taken into account in considering the efficiency and economy of the carriers' operations, it seems clear that the Commission has not been given any authority to determine what such expenditures should be.*" (Emphasis supplied.)

This Court also has had occasion to rule on this matter in *General American Tank Car Corporation* v. *Eldorado Terminal Co.*, 308 U.S. 422, 428-429:

"Freight cars are facilities of transportation, as defined by the Act. The railroads are under obligation, as part of their public service, to furnish these facilities upon reasonable request of a shipper, and therefore have the exclusive right to furnish them. They are not, however, under an obligation to own such cars. They may, if they deem it advisable, lease them so as to be in a position to furnish them according to the demand of the shipping public and, if the carriers do so lease cars, the terms on which they obtain them are not the subject of direct control by the Interstate Commerce Commission. If the carriers pay too much for the hire of such cars the Commis-

sion may, of course, refuse to allow them to reflect such excess cost in their tariffs. *The lessor of such cars to a railroad, however, is not itself a carrier or engaged in any public service. Therefore its practices lie without the realm of the Commission's competence.*" (Emphasis supplied.)

See also *Ellis* v. *Interstate Commerce Commission*, *supra*, pages 443-444.

Finally, Congress itself has recognized the Commission's initial lack of jurisdiction over private car lines when in the Transportation Act of 1940 it amended Section 1(14) of the Act so as specifically to provide such authorization.[26] Obviously,

[26] The legislative history of the Transportation Act of 1940 reveals that none of the bills as they were originally introduced in the Congress looking toward the numerous amendments which were added to the Act at that time provided for increased authorization of the Commission over private car lines. The subject was first mentioned in the course of the hearings on S. 2009, 76th Congress, 1st Session, which ultimately, as amended, was enacted as the Transportation Act of 1940. As initially mentioned, it was proposed by representatives of shippers of fresh fruits and vegetables that the Commission be given authority to regulate the compensation which the rail carriers should pay for the use of refrigerator cars. (Hearings, Senate Committee on Interstate Commerce, 76th Congress, 1st Session, on S. 1310, 2016, 1869, and 2009, p. 434). Subsequently, it was proposed to give the Commission such jurisdiction not only with respect to refrigerator cars but also with respect to all private cars, and it was suggested that this could be accomplished simply by amending Section 1(3)(a) so as to insert the term "private car companies" immediately following the term "express companies" already appearing in said Section (*Id.* p. 558). Senator Reed, presiding at the hearing, expressed approval of the suggestion, but stated that he would request the Interstate Commerce Commission to prepare appropriate language to accomplish the result desired. Subsequently, in the course of the hearing, Senator Reed asked Commissioner Eastman, who appeared for the Commission, whether the Commission's jurisdiction over the compensation to be paid by rail carriers for

if the appellants' contention that the mere listing of transportation facilities in Section 1(3)(a) subjects the owners of such facilities to the Commis-

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the use of private cars could not be accomplished simply by inserting the term "private car companies" after the term "express companies" in Section 1(3)(a). Commissioner Eastman stated that it would be necessary to amend the Act in a different manner than that suggested and promised to have the necessary language prepared. (*Id.* pp. 786-787). It is to be noted from this incident that the Commission itself recognized that the definitions contained in Section 1(3)(a) do not in and of themselves empower the Commission, and that the Commission's power stems from the substantive provisions of the statute.

The only further explanation for the amendment of Section 1(14)(a) appears in the House Report (House Report No. 2832, 76th Congress, Third Session [To accompany S. 2009]) in which the statement is made (page 65):

> "Section 4(A). Car Service; Protective Service.
> "Section 5 of the House amendment amended Section 1(14) of the Interstate Commerce Act so as to make it clear that the Commission's jurisdiction with respect to car service and the compensation to be paid for the use of any car now owned by the carrier using it includes a car of private as well as of carrier ownership. The conference substitute in Section 4(A) retains this change in present law and also gives the Commission increased authority as to the terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle. The conference substitute adds a new subparagraph (b) to Section 1(14) requiring approval of the Commission in the case of contracts for the furnishing to common carriers by railroad, or to express companies, of protective service against heat or cold."

Thus, it is clear that both Congress and the Commission deemed it necessary, in order to empower the Commission to regulate the compensation as between carriers and private car companies, to amend Section 1(14)(a) of the Act and that neither Congress nor the Commission felt this could be accomplished simply by including private car companies within the concept of common carrier as defined in Section 1(3)(a).

sion's jurisdiction, it would have been unnecessary for the Interstate Commerce Act to be amended in 1940 to subject private car lines to regulation.

Equally pertinent are the circumstances governing the recent amendment of the Interstate Commerce Act to extend the Commission's authority over the activities of freight forwarding agencies, 49 U.S.C. 1001 *et seq.*

It is clear upon principle and authority that the status of the Stock Yards, insofar as concerns the question of whether the ownership of the track in question subjects it to regulation by the Commission, is fixed by the functions it performs. This function may be stated thus: It owns a private track located on its premises and permits the railroad to use it for specified purposes. It does not hold itself out to the public to permit the entire public to use this track under unlimited conditions; it deals only with the railroad carrier; it has no interest in the transportation charges of any of the railroads, it does not file tariffs; it has no motive power; it could not carry goods from place to place if it wanted to; it is not engaged in "transportation" either as that term is defined or used anywhere in the Act. There is no common ownership, management, control or arrangement between the Stock Yards Company and the railroad carriers such as that contemplated by Section 1(1)(a) of the Act. Manifestly, the Stock Yards is not a common carrier in any sense by virtue of its ownership of this track. It is at most a company permitting a carrier (and not the public) to use its track for limited purposes.

*Section 2 of the Elkins Act does not empower the*

*Commission to issue the order in question:* It is now apparently conceded by appellants that the Commission has no jurisdiction over the person of the Stock Yards on the theory that it is a common carrier subject to the Act. Although the complaint filed by Swift & Company in the proceeding before the Commission alleged that the Stock Yards was a common carrier, this position was never asserted seriously, but, on the contrary, it was argued both orally and in the briefs before the Commission and the court below that the Commission had jurisdiction over the person of the Stock Yards by virtue of Section 2 of the Elkins Act (49 U.S.C. 42).

Indeed, it is apparent that Swift & Company has never really believed that the Stock Yards was a proper party to this proceeding under any circumstances. During the course of the oral argument before the Commission on October 3, 1945, counsel for Swift & Company stated (R. 542):

> "Now, you will notice in this correspondence they have talked about, that the Stock Yards said with respect to the railroad—and I think *the railroad is the only person whom I have a remedy against here*—that they would not let them use this track without proper compensation. There has never been any suggestion to us by the New York Central as to what compensation they ought to have, if any." [Emphasis supplied.]

The court below found it unnecessary to decide whether, by virtue of Section 2 of the Elkins Act, the Commission had jurisdiction over the person of the Stock Yards, since, in the view taken by the court below, the order was otherwise invalid be-

cause the Commission had erred in holding the Stock Yards without power to restrict the use of its Track 1619 in the absence of an acquisition by the carriers of the track by purchase or condemnation. The disposition of this case by the court below was correct in law and in fact. Nevertheless, it is submitted that the Commission does not have any jurisdiction over the person of the Stock Yards by virtue of Section 2 of the Elkins Act.

At the outset, it should be emphasized that there is not even a contention in the case at bar that a violation of the Elkins Act is in any manner involved herein.[27] On the contrary, the Commission's assertion of authority with respect to the Stock Yards was predicated upon its view that any person having contractual relations with a carrier may be made a party to a proceeding between the carrier and a shipper even where the subject matter of the controversy between the shipper and carrier relates entirely to matters with which the Elkins Act is not concerned. The Commission's view in this respect was rejected many years ago by this Court. *Ellis* v. *Interstate Commerce Commission*, 237 U.S. 434. It is the contention of the Stock Yards that Section 2 of the

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[27] There is at least an inference in the Government's brief (p. 49, note 10) that the arrangement between the Stock Yards and the railroads might violate the Elkins Act. That inference, however, is wholly unwarranted and misleading and typifies the manner in which the Government has consistently sought to buttress the Commission's order by injecting into the case extraneous issues of fact and principles of law. The uncontroverted fact is that there is no intimation in the record that the Commission ever entertained any notion that the practices condemned by the Elkins Act have been employed by the appellees herein.

Elkins Act merely authorizes the Commission or the court, *in proceedings before them involving the practices condemned by the Elkins Act*, to make all persons participating in or affected by such practices parties to the proceedings and subject to appropriate orders and writs. The Stock Yards' contention, therefore, is that no support can be found for the Commission's order against it, by resort to Section 2 of the Elkins Act, in view of the absence in the record of any circumstance tending to show violations of the substantive provisions of the Elkins Act.

This follows from a consideration of the provisions of Section 2 and related sections in the light of the language of the Elkins Act, of its legislative history, and of the evil against which it was directed.

Section 2 of the Elkins Act (49 U.S.C. 42) provides as follows:

> "§ 42. *Parties included in proceedings to enforce law.* In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceeding be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

The Stock Yards contends that the admittedly broad language of this Section should be read in the light of other sections of the Elkins Act. When so construed, the jurisdiction of the Commission, as of the courts, under Section 2 of the Elkins Act, over "persons interested in or affected by the rate, regulation, or practice under consideration," refers to the acts condemned by Section 1 of the Elkins Act (49 U.S.C. 41).[28]

The Commission and the courts, by Section 1 of the Elkins Act, are given authority to deal with a situation involving "any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to" the Interstate Commerce Act "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier . . . or whereby any other advantage is given or discrimination is practiced." *Union Pac. R.R.* v. *United States*, 313 U.S. 450, 464.

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[28] This Court has aptly said, in this connection (*Baltimore & Ohio Ry.* v. *United States*, 277 U.S. 291, 299-300):

> "The word 'practice', considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its meaning varies so widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it."

Thus, such terms as "rules," regulations," and "practices" are not loosely used in the Elkins Act or in the Interstate Commerce Act, but are to be confined to the context in connection with which they immediately appear.

As will be hereinafter shown, Congress was preoccupied, in enacting the Elkins Act, with the widespread abuses involved in the granting of secret rebates to the large shippers (see pp. 70-75, *infra.*). Specific reference in Section 1 of the Elkins Act was made to such abusive practices. The Stock Yards contends that Section 2, likewise, was enacted with reference to such matters. Certainly Section 3 was aimed at providing a new remedy for striking down such abuses. Except for the possibility that Section 2 may be said to have a broader objective, it is submitted, therefore, that the Elkins Act, in its entirety, was addressed to the problem of combating devices by which railroads conferred rate advantages upon favored shippers.

The history of the legislation known as the Elkins Act clearly supports the Stock Yards' assertion that the Elkins Act in its entirety was intended by Congress to deal with the problem of preventing the giving of rate concessions or advantages to favored shippers. That this problem was uppermost in the minds of all who participated in the passage of the legislation is revealed both in the Annual Reports of the Commission for the several years preceding enactment of the legislation and immediately thereafter, and also in the legislative reports and debates pertaining to this measure.

For several years immediately preceding enactment of the legislation, the Commission's Annual Reports were predominantly concerned with the matter of rebates and other forms of rate concessions which the railroad companies were grant-

ing to the large shippers of the day. (See, for example, the Twelfth Annual Report of the Interstate Commerce Commission (1898), pp. 5 *et seq.*; Fifteenth Annual Report (1901), pp. 5-16.) In the 1901 Report, appears an elaborate discussion of the prevalence of these practices as revealed in the Commission's investigation of the rates secretly being charged to the major meat packing corporations in connection with the movement of packing house products.

In its 1903 Report, the Elkins Act was highlighted and discussed at length (Seventeenth Annual Report of the Interstate Commerce Commission (1903), pp. 5-10). The Commission pointed out that the Elkins Act, "broadly speaking," affected only the practices relating to departures from published tariffs. After an analysis of the provisions of the new legislation, the Commission said (p. 10):

> "* * * No one familiar with railway conditions can expect that rate-cutting and other secret devices will immediately and wholly disappear, but there is basis for a confident belief that such offenses are no longer characteristic of railway operations.
>
> "* * * The wrong-doing which this legislation seeks to more effectually prevent has its origin and inducement almost altogether in the competition between carriers, and so long as that competition is subjected to no legal restraint it will be liable to find expression to a greater or less extent in secret and preferential rates. * * * In its present form the law appears to be about all that can be provided against rate-cutting in the way of prohibitive and punitive legislation."

The record of the legislation in Congress itself is in the same vein. Especially indicative of Congressional intention respecting the legislation is the discussion in the House Report (House Report No. 3765, 57th Congress, Second Session, February 12, 1903 (to accompany S. 7053)). The Report states that there were "four principal propositions included in the bill." The first was to make corporations liable in the same manner as individuals. As to the second, the Report stated (page 5):

> "The existing law prohibits rebates and discriminations, but does not prevent the cutting of published rates unless discrimination is shown."

Investigations by the Interstate Commerce Commission respecting rates on dressed beef and packing house products were adverted to as revealing that the railroads for years had carried such products at substantially below published rates. While this secret rate-cutting did not result in discrimination between the shippers, it had the effect of giving the established packers "absolute control of the business."

The third proposition noted in the House Report as being included in the bill involved Section 2, the Report stating (pages 5-6):

> "Section 2 of the bill makes it lawful to include as parties to any proceeding for the enforcement of the Interstate Commerce Act, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration and authorizes final judgment against such additional party. This is a much-needed

amendment to the Act, for the purpose of enabling all parties in interest to be brought before the court in the same suit."

As to the third proposition, the Report stated (page 6):

> "The first and second propositions above referred to practically exhaust the power of legislation to prevent rebates and discriminations through criminal prosecutions. *We conceive it to be the desire of Congress to absolutely prevent, if possible, the granting of discriminations in the way of railroad rates to favored shippers. This is by many claimed to be the greatest abuse of the day.* But we all know that the officers of the railroads who grant rebates and the officers of the private corporations who solicit and accept them are men of high standing * * * and that it is a very difficult matter to obtain evidence sufficient to indict them, and still more difficult to obtain judges and juries who will convict them.
>
> "It is proposed, therefore, to provide a civil remedy as well as a criminal remedy against rebates and discriminations." (Emphasis supplied.)

There was practically no debate on the bill (S. 7053) in the Senate (36 Cong. Rec. 1632-1634). Such debate as there was in the House (36 Cong. Rec. 2151-2159) clearly shows that the Congress was concerned predominantly with the question of concessions and rebates and other devices whereby carriers were charging particular shippers rates less than the published tariffs. The Congress was preoccupied with the whole problem of trusts and monopolies and considered the rebate question as

merely one aspect of the trust problem with which it was confronted. The statement of Representative Overstreet is typical:

Representative Overstreet said:

> "Mr. Speaker, those members of the House who undertook in a straightforward way to reach some conclusion by way of legislation upon this problem sought to accomplish three things, * * * The first of these propositions was a measure to expedite cases now pending in order that we might have the judgment of the Supreme Court upon some of these problems. That bill has passed and I think it is now a law. The second proposition was some measure of publicity through which great corporations might be compelled to disclose certain methods of doing business, and especially those things upon which rests the valuation of their capital stock. *The third proposition was the effort against discriminatory practices in rebates, existing between great shippers and carriers.*
>
> * * *
>
> "The chief and most material part of this bill now under consideration directly affects the discriminatory practice in rebates. * * * *" (36 Cong. Rec. 2153) (Emphasis supplied.)

Objectively considered, the entire legislative history of the Elkins Act inevitably leads to the conclusion that the Elkins Act in its entirety was addressed to the problem of preventing the granting of secret rate concessions and advantages to favored shippers. Section 2 of the bill, although it does not in terms specifically refer to this prob-

lem, was not discussed independently of the remaining provisions of the bill and it may be fairly assumed, therefore, that Section 2 was intended to provide a mechanism for effectuating the substantive provisions of the legislation.

The authorities[29] upon this point fail to support the Government's contention that, under the circumstances of record herein, jurisdiction may be asserted by virtue of Section 2 over the person of the Stock Yards. Wherever jurisdiction has attached over a non-carrier in cases involving Section 2 of the Elkins Act, the case has involved rate advantages of the character discussed above and the non-carrier has been an instrumentality by which such rate advantage was effectuated.

If it should be determined that Section 2 of the Elkins Act was intended to empower the Commission to order the unlimited use of the Stock Yards' track under the facts herein disclosed, the Stock Yards would be deprived of its property without due process of law. *Producers Transportation Co.* v. *Railroad Comm'n of California*, 251 U.S. 228. *Cf. Del., L. & W. R.R.* v. *Morristown*, 276 U.S. 182. A statute should, if fairly possible, be construed not only to avoid the conclusion that it is unconstitutional, but also grave doubt on that score. *National Labor Relations Board* v. *Jones &*

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[29] *United States* v. *Milwaukee Refrigerator T. Co.*, 145 Fed. 1007; *United States* v. *Phillips Petr. Co.*, 36 F. Supp. 480, 484; *Glens Falls Portland Cement Co.* v. *Delaware and Hudson Co.*, 66F. (2d) 490, 491-492; *Spencer Kellogg and Sons* v. *United States*, 20 F. (2d) 459, cert. den. 275 U. S. 566; *New York, N. H. & H. R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361; *General American Tank Car Corporation* v. *Eldorado Terminal Co.*, 308 U. S. 422; *Union Pacific R.* v. *United States*, 313 U. S. 450.

*Laughlin Steel Corp.*, 301 U.S. 1, and cases cited therein; *Wright* v. *Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440. This salutary rule is applicable in determining the meaning to be accorded to Section 2 of the Elkins Act where not only the language but also the purpose and history of the Act clearly show that Congress did not intend thereby to give the Commission jurisdiction over non-carriers whose dealings with carriers do not involve devices whereby rate advantages among shippers are effectuated.

By none of the indicia indicated as calling into play the powers of the Commission under the Elkins Act could the Commission conceivably have jurisdiction over the Stock Yards. The Stock Yards do not buy, sell, or own livestock. Neither is it a shipper or consignee of livestock. No question of rebate, concession, discrimination, or advantage, whereby less than published rates are charged, is here involved. It was not contended before the Commission or in the court below, nor did the Commission find, that the Stock Yards was securing any rebate or was the agency by which any rebate was made to anyone. Neither is the Stock Yards "interested in the traffic" of the railroads moving over the lines of the common carriers in the sense in which that expression appears in Section 3 of the Elkins Act. The record shows that the Stock Yards is willing for any traffic to move over its Track 1619 so long as it receives therefor the compensation which it proposed. It is totally disinterested in the charges as between the shipper and the carrier.

As this Court said in *Ellis* v. *Interstate Commerce Commission*, 237 U.S. 434, 445:

> "The Armour Car Lines not being subject to regulation by the Commission its position was simply that of a witness interested in but a stranger to the inquiry, and the Commission could not enlarge its powers by making the company a party to the proceedings and serving it with a notice. * * * ".

B. *The trackage agreement governing the use of Track 1619 is not subject to the Commission's control.*

In the last analysis all of the contentions made by appellants to support the Commission's order rest basically upon the fact that the Stock Yards had contractual relations with a common carrier by rail subject to the Act. But the difficulty with all of the contentions predicated upon this circumstance is that the Commission was not empowered, by virtue of this fact, to limit the Stock Yards' control over use of Track 1619.

Even with respect to contracts between common carriers by rail which are subject to the jurisdiction of the Commission, the authority of the Commission with respect to trackage agreements *between carriers* is strictly limited by the provisions of the Act. Thus, Section 1 (18) of the Act, which deals with the authority of the Commission with respect to extensions and abandonments of lines, provides that "Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, *without the approval of the Commission*, for the joint ownership, or joint use of

spur, industrial, team, switching, or side tracks." [Emphasis supplied.]. The Commission has held that this Section means what it says, namely, that carriers may make the indicated types of contracts without its approval (*Chicago, M., St. P., and P. R. Co. Trustees Operation*, 247 I.C.C. 1, 7). This decision was after the passage of the Transportation Act of 1940 which gave the Commission authority to approve certain types of agreements between carriers as provided in Section 5 (2) of the Act. The Commission pointed out that other arrangements between carriers for the joint operation of spur tracks than those mentioned in Section 5 (2) could be made without its approval.

By virtue of the provisions of Section 5 (2) of the Act, as amended by the Transportation Act of 1940, it is provided (Section 5 (2) (a)) that it shall be lawful, with the approval and authorization of the Commission, for

> "* * * two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another." (Section 5(2) (a) (i).)

It is also provided that it shall be lawful, with the approval and authorization of the Commission,

> "* * * for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto." (Section 5(2) (a) (ii).)

The careful and specific manner in which the Congress has empowered the Commission to regulate certain types of trackage agreements between

carriers—*Thompson* v. *Texas-Mexican R. Co.*, 328 U.S. 134—and has excluded certain other types of trackage agreements between carriers from the authority of the Commission, shows conclusively that there has been no intent to confer any general authority on the Commission with respect to all types of trackage agreements. *No provision will be found in the Interstate Commerce Act which gives the Commission any authority with respect to trackage agreements made by carriers with non-carriers for the right to use tracks owned by the non-carriers for special purposes.*

Even in the situations in which the Congress has specifically conferred authority upon the Commission to deal with trackage agreements between common carriers by rail, it is to be noted that the Congress has not declared any general policy to the effect that such trackage agreements are invalid for any reason.

Trackage agreements of the character of the one here involved are widely made by carriers throughout the country and, indeed, it is to the advantage of the shipping public that this should be so.

The manner in which the Commission treated the trackage agreement between the Stock Yards and the New York Central Railroad Company with respect to the limited use of Track 1619 is in direct conflict with the prior decisions of the Commission and of the courts upon the subject of trackage agreements wherever the question has arisen,[30] and if the Commission's order were upheld it would seriously interfere with the objectives of the Na-

[30] See note 18, *supra*.

tional Transportation Policy declared by Congress by disabling carriers from making arrangements beneficial to the shipping public.

In view of the departure of the Commission in the case at bar from its own prior decisions on its powers with respect to trackage agreements, as well as its departure from the holdings of this Court and of other courts upon the same subject, the Stock Yards feels that it is appropriate to analyze some of the previous decisions upon the subject of trackage agreements.

This Court had occasion to consider and to recognize the validity of agreements of the type now under consideration in *Rock Island Ry.* v. *Rio Grande R.R.*, 143 U.S. 596. This case was an appeal from a judgment construing a contract between the predecessors of the Rock Island Railway and the Rio Grande Railroad, whereby certain facilities, including the Denver station of the Rio Grande, were leased to Rock Island. In affirming the decision of the lower court, this Court upheld the contract made by the parties, and *held, among other things, that the Rock Island Railway did not have the right, under the contract, to use the Denver station of Rio Grande for traffic not contemplated by the parties to the contract.*

*Union Pacific Railway Co.* v. *Chicago, etc., Ry. Co.*, 163 U.S. 564, one of the leading cases on this subject, also involved the right of a railroad to secure specific performance of a trackage agreement between two common carriers. The Court held that the cases[31] dealing with the inability of

[31] Cases involving contracts which dispossess common carriers of all of their property and of all capacity to

railroads to make contracts by virtue of which they disabled themselves from performing their duties as common carriers imposed by law were inapplicable to the trackage agreement under consideration, for the reason that the carrier which owned the property involved and had contracted for its use by another, had not disabled itself from performing any duties imposed upon it. At page 589 this Court said:

> "We are of opinion that it was within the powers of the Pacific Company to enter into contracts for running arrangements, in-

perform their public duties are inapplicable. See also note 25, *supra*. In the case at bar, the Commission, in its report of May 3, 1946, evidently viewed the case as one in which this principle was applicable, and, indeed, the brief filed on behalf of the Government in this Court states such issue to be the principal question. There can be no doubt, of course, about the principle, but it is inapplicable to the facts in the case at bar just as it was inapplicable in the case before this Court in *Union Pacific Ry. Co.* v. *Chicago, etc. Ry. Co.*, 163 U. S. 564. This is true because the principle only becomes applicable where there is a duty on the part of the railroad imposed by the Interstate Commerce Act or otherwise; but there can be no duty where there is no power and, in the case at bar, there is clearly no power upon the part of the common carriers by rail to operate over the Stock Yards' Track 1619 in defiance of its contractual right. *Alford* v. *Chicago, Rock Island and Pacific Ry. Co.*, 3 I. C. C. 519, 532-533, and authorities in note 18, *supra*. Thus, both the Commission, in the proceeding before it, and the appellants now, misstate the issue by assuming a power on the part of the railroad carriers to operate over Track 1619, and, hence, a duty. The same result is inevitably reached when viewed from another aspect: Namely, by the trackage agreement the New York Central Railroad Company cannot be said to have disabled itself from performing its duties with respect to its lines which it fully controls. On the contrary, it secured the right to serve Swift & Company in a manner in which it would have been unable to do without such rights as it did secure und · the trackage agreement.

cluding the use of its tracks, and the connections and accommodations provided for, and we cannot perceive that this particular contract was open to the objection that it disabled the Pacific Company from discharging its duties to the public. By the contract the Pacific Company parted with no franchise, and was not excluded from any part of its property or the full enjoyment of it. What it agreed to do was to let the Rock Island into such use of the bridge and tracks as it did not need for its own purposes. This did not alien any property or right necessary to the discharge of its public obligations and duties, but simply widened the extent of the use of its property for the same purposes for which that property was acquired, to its own profit so far as that use was concerned, and in the furtherance of the demands of a wise public policy. *If, by so doing, it may have assisted a competitor, it does not lie in its mouth to urge that as rendering its contract illegal as opposed to public policy.* Ability to perform its own immediate duties to the public is the limitation on its *ius disponendi* we are considering, and that limitation had no application to such a use as that in question." (Emphasis supplied.)

In speaking of the compensation agreed upon by the parties to the trackage agreement before it, the Court had the following to say, at page 594:[22]

[22] What this Court said in the *Union Pacific Railway* case (163 U. S. at p. 594), respecting compensation, is in marked contrast to the holding of the Commission in the case at bar (R. 38, 39, 40). The Commission, in concluding that the railroad carriers and the public had the *right* to operate over Track 1619 of the Stock Yards because of the contract, but, at the same time, anomalously

"* * * And as, when it contracts for deliveries beyond its own line, it must pay the connecting company for its services, that *compensation might be fixed by the parties upon any basis they agreed to.* Here it agreed to pay a certain sum per mile for the mileage over which its trains run, and the difference between that and any other mode of payment did not go to the powers of the company. Where a corporate contract is forbidden by a statute or is obviously hostile to the public advantage or convenience, the courts disapprove of it, but when there is no express prohibition and it is obvious that the contract is one of advantage to the public, the rule is otherwise." (Emphasis supplied.)

Courts in other jurisdictions have similarly considered the problem of trackage agreements and

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holding that the restriction as to the use of its property by the Stock Yards for the hauling of livestock was unlawful, said (R. 40):

"* * * *it is our opinion that the stockyards could not lawfully collect, or the Railroad pay, either yardage charges or any other amount of special compensation in effect demanded from the Railroad as a penalty for observing its tariffs and other duties under the laws to which it is subjected.*" (Emphasis supplied.)

Now the Government, in its brief filed in this Court (p. 44 *et seq.*), seems to argue that this Court should not concern itself with the compensation which the common carriers by rail should pay the Stock Yards for use of its track for moving livestock, since it contends that such matters are of private concern between the carriers and the Stock Yards. This reference to the vacillating position taken by the Commission in the proceeding before it, which was clearly erroneous, and the position now apparently assumed by appellants, is merely cited as another instance of the confusion with which the Commission and the other appellants have surrounded this case and the true issues involved from the beginning.

have reached the conclusion that the railroad which acquires a mere right to traverse a track owned by another person must operate upon that track in accordance with the limitations imposed by the grantor of the right.[33]

In *K. & M. Ry. Co.* v. *The Public Utilities Commission of Ohio*, 96 Oh. St. 414, the Supreme Court of Ohio upheld the validity of a trackage agreement between two railroads.[34] In that case the Hocking Domestic Coal Company filed a complaint with the Public Utilities Commission of Ohio,[35]

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[33] *Morgan Run Ry.* v. *Public Utilities Commission*, 98 Oh. St. 218, does not controvert the proposition stated in the text, since examination of the facts before the Supreme Court of Ohio in that case reveals that the decision was reached because of facts not present in the case at bar. In the *Morgan Run Railway* case, the common carrier by rail which was refusing to ship coal over the lines of a coal company to another person on the ground that the track on the property of the coal company (over which it had to operate to reach such person) was owned by the coal company and not by it, really owned the coal company also. In short, there was common ownership of the common carrier and of the coal company. The record in that case also showed that the carrier had for years reported the whole track as its own for tax purposes and that the carrier had not refused to ship coal until the complainant and the coal company (owned by carrier) had got into a contract dispute. Where the question of trackage agreements has come before it unfettered by any such considerations, the Supreme Court of Ohio has fully sustained the validity of trackage agreements, including the restrictions therein, similar to the one here involved. *K. & M. Ry. Co.* v. *The Public Utilities Commission of Ohio*, 96 Oh. St. 414.

[34] The same trackage agreement was upheld by the Interstate Commerce Commission in *Hocking Domestic Coal Co.* v. *K. & M. Ry. Co.*, 44 I. C. C. 392. See text, *infra*, at pp. 95-96.

[35] In Ohio, railroads, as well as public utilities, are subject to the supervision of and regulatory powers of the Public Utilities Commission. Page's *Ohio General*

alleging that its mines were located along the lines of the K. & M. Railway and that the railroad was refusing to furnish cars to take coal from it. The railway company defended its position on the

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*Code* (Annotated), Sections 501; 502, 614-3. There are some vague references in the Government's brief to the jurisdiction of the Public Service Commission, or of the Interstate Commerce Commission, over the abandonment by New York Central of operation over Track 1619. The short answer to whatever is meant to be implied by such references is that no such abandonment has ever occurred as would necessitate a determination of whether the Public Utilities Commission of Ohio, under its jurisdictional statutes, or the Commission, under Section 1(18) of the Act, would be authorized to approve such abandonment. The record herein does not show that the New York Central is seeking to abandon its limited right to operate over Track 1619. This is another instance in which the Government in its brief has wandered off into matters not related to facts in the record. Although the Court below excluded it from the record as having been sent after the proceeding before the Commission was closed (R. 142), the Government has discussed in its brief (note 9, p. 39) a letter (Ex. E, R. 54) by which the Stock Yards, following the Commission's order of May 3, 1946 (in which the Commission indicated the Stock Yards might do so (R. 38, R. 40)), pursuant to the trackage agreement, advised New York Central that, effective May 1, 1947, it would altogether withdraw the right to use its Track 1619. Meantime, however, before the May deadline was reached, the court below enjoined the unlawful order of the Commission which had wrongfully ordered Track 1619 to be used to the Stock Yards' detriment. Hence, there was no occasion for the Stock Yards to proceed with its plans to withdraw the use of its track on May 1, 1947, in order to protect its interests. Consequently, the Stock Yards postponed its notice and permitted the carrier to continue the limited use of the track which it had always made of it, with a proviso that the notice to terminate would again become effective on notice. All of these facts are dehors the record, and have no bearing on the issue, but the Stock Yards feels that the Court is entitled to know them in order that it may not be mislead by the Government's brief into concluding that any issue respecting an abandonment is involved in the case at bar.

ground that it had no right under the terms of the contract respecting its operation over the tracks in question to make such connection with the mine of the Hocking Domestic Coal Company. The Supreme Court of Ohio upheld the validity of the trackage agreement. The court said, at page 426 of its opinion, that:

> "Our holding is that plaintiff in error under the limitations and restrictions contained in the trackage agreement has no right to the use of the switch connection with the mine tracks of The Hocking Domestic Coal Company, nor has it any authority to use the right of way of The Hocking Valley Railway Company in making a connection between its drill track and the mine tracks of the Coal Company.
>
> "But it is urged by counsel that even though plaintiff in error is prevented by the restrictions and limitations in the trackage agreement from rendering the service which the Coal Company is seeking, yet such an agreement is against public policy and void.
>
> * * *
>
> "* * * We know of no statute which would require The Hocking Valley Railway Company to grant the use of its facilities for that purpose. When it granted the use of its tracks and sidings between Gallipolis and Pomeroy, it did so voluntarily, subject, however, to certain limitations and restrictions. It is not likely that a trackage agreement would have been consented to without those limitations and restrictions, * * *
>
> "We see no valid legal objection to this agreement. Similar agreements have met

the approval of the supreme court of the United States in a number of cases, among which are *Union Pacific Ry. Co.* v. *C., R. I. & P. Ry. Co.*, 163 U. S. 564, and *Chicago, R. I. & P. Ry. Co.* v. *Denver & R. G. Ry. Co.*, 143 U. S. 596."

In *Sholl Brothers* v. *The Peoria and Pekin Ry.*, 276 Ill. 267, Sholl Brothers sought and obtained an injunction against the railroad, preventing it from moving on or over tracks located on a certain right of way any coal or coal mine products not mined or produced on the lands or by virtue of the coal rights of Sholl Brothers. The Supreme Court of Illinois affirmed this judgment. Involved was a contract between the coal company and the railroad for the joint construction and maintenance of a track extending over the property of the coal company from the main line of the railroad to the coal mine, giving the railroad company the "right to use said right of way and tracks in handling the business of or for the purpose of making connection with any other industry, *except coal mine*, that may hereafter be located adjacent to said right of way or reached from said right of way" [Emphasis supplied]. There were no industries other than the Sholl Brothers' mine adjacent to or reached by this right of way at the time the track was laid over it. However, about the time the track was completed, a site for the state asylum for the insane was chosen just beyond the land of Sholl Brothers' mine, and the commissioners of the asylum constructed railway tracks on the asylum grounds which they connected with the tracks on Sholl Brothers' land, and thereafter the latter track was

used for the transportation of freight to the asylum. Sholl Brothers furnished the asylum with coal, but in some instances coal was delivered to the asylum which was produced at some other mine than that of Sholl Brothers. In 1911, the railroad company issued a tariff showing a rate for the delivery of coal over the track in question to the asylum, and announced that such service was open to all persons who might demand it. It afterwards did deliver to the asylum over such tracks cars loaded with coal from mines other than those on the land of Sholl Brothers, one of them being a mine located on its main line. The Supreme Court of Illinois said, at page 271 that:

> "* * * It must be remembered in this connection that the railway company does not own this right of way. The fee in the land and right of way is owned by the defendants in error, *and the right of the railway company to use the tracks and right of way is restricted to whatever rights it has by the terms of the contract.*" (Emphasis supplied.)

And at page 274 *et seq.*, the Court said:

> "* * * It is shown by the evidence, and not disputed, that for many years after the contract was made and the track used, and after the insane asylum was occupied, the officers of plaintiff in error refused shipments of coal over said track from any mine except that of defendants in error without their consent, thus showing their construction of the contract. This construction and interpretation of the contract by the parties thereto must now be considered, and we

think, under the circumstances, must be upheld as the proper construction and meaning thereof.

"Plaintiff in error also contends that such a construction of the contract would be contrary to public policy and void, * * * It is true that a railroad corporation cannot make a valid contract limiting the use of *its* tracks, which are declared to be public highways by section 12 of article II of the constitution. But that is not this case. *The side-track involved in this case is not a part of the public railway of plaintiff in error. It is connected with said railway but not a part of it, and could not become a part of the railway system of plaintiff in error unless it be purchased or acquired by condemnation proceedings. As hereinbefore pointed out, the right of way on which the track was built is the private property of defendants in error, and the right of the railway company therein is limited and governed by the provision of the contract that has been considered.*

"A case in point and which arose under similar circumstances is that of *Koelle* v. *Knecht*, 99 Ill. 396. * * * It was said on page 404 of the opinion: 'It would work monstrous wrong and injustice to compel an individual who had constructed a railroad across his farm to assume the duties and liabilities of a common carrier against his will and transport over his road all commodities that the adjoining landowner or his neighbors might require. Those who made that instrument did not intend to impose such duties and liabilities on private individuals against their will. It was only public railroads they intended to regulate,

and this switch is not of that character.' What is said in that case applies to the case at bar. * * *

"It would doubtless be of advantage to the State to be allowed to ship coal over this side-track to the asylum, but there is nothing in the circumstances of this case which gives the State any greater rights than an individual would have similarly situated." (Emphasis supplied.)

In *Alabama Central R.R. Co.* v. *Alabama Public Service Commission*, 200 Ala. 536, a railroad and a saw mill entered into a contract whereby the railroad acquired a license or right to operate its trains and service over the mill's logging road for the purpose of carrying freight and passengers for hire, but did not acquire the right to haul or transport pine logs or pine lumber over the logging road, except for its own use. The saw mill company retained the paramount right to the use of the tracks and reserved the right to take up the track or change its location. The railroad acquired the right to use a Y of the logging company and to erect upon the property of the saw mill company switches, side-tracks, and platforms necessary in conducting its business as a common carrier. Thereafter, another lumber company sought and secured from the Alabama Public Service Commission an order requiring the railroad to put in a side-track on the logging road of the saw mill company for the use of the rival lumber company in transporting its pine lumber through the agency of the railroad as a common carrier. The Supreme Court of Alabama said, at page 537:

"*If the logging road in question were a*

*public highway, or a railroad in which the public had acquired rights by condemnation proceedings or by dedication to a public use, and its owners or those who had acquired control of it were common carriers, or were engaged in the business of a public service, then the Public Service Commission or the courts, when authorized by the Legislature, could regulate and control the use of the railroad so as to serve the public, and do so without discrimination. Here, however, the road involved is a private road and not a public one, and those who own, and have the exclusive control of it, are private individuals or corporations, who have merely consented or agreed that appellant, a public service corporation, may use it under certain restrictions and regulations. It may be, as we have said, that this contract or agreement is void, because against public policy; but, if so, it cannot be relieved against by compelling the parties to make a new contract, nor by compelling them to so modify it as to make it legal and binding on both parties.* Neither the Public Service Commission nor the courts possess such powers. While the common carrier is so using this private road under a void contract, it may be liable as for damages for unwarranted discriminations; and its illegal contract might not excuse or justify for such discriminations; yet the common carrier has no right to put in switches or side tracks on this logging road without the consent of its owners, and, if such were placed, the owners would have the absolute right to remove them, and even the main line, and to wholly prevent the use of the road by appellant or by the public. Surely the Public Service Commis-

> sion nor the courts ought to compel a common carrier to use or improve private property in a way or manner in which it has no right so to use it, and could not voluntarily use it." (Emphasis supplied.)

In the case at bar, the Commission, in holding that the trackage agreement between the New York Central Railroad Company and the Stock Yards was valid for the purpose of giving the property to the railroad and to the public but invalid insofar as it contained limitations designed to protect the interests of the Stock Yards, departed from its own prior decisions upon this subject.

As long ago as 1890, the Commission held in *Alford* v. *Chicago, Rock Island and Pacific Ry. Co.*, 3 I.C.C. 519, that it had no authority to change a contract between two carriers which provided for trackage rights. In that case, the Commission was concerned with the construction and validity of a trackage agreement whereby one railroad secured the right to use the tracks of another railroad for the passage of its trains, but agreed not to do business on that portion of the tracks. A complaint was filed by a person located along the tracks who sought to have the Commission order the carriage of his freight by the carrier which had agreed not to do so in the trackage agreement. The Commission upheld the contract, including the limitation mentioned. The Commission said, at page 522:

> "This contract was made for that purpose, giving them the right to run their trains over the Union Pacific between Kansas City and Topeka. It was merely a trackage ar-

rangement, constituting in no sense a lease of the line of the Union Pacific. That company continued to operate its own lines as before."

And, at page 529 *et seq.*, the Commission said:

"But the main question which concerns us now is whether, while the agreement is conceded to be legal, so far as it makes a trackage arrangement, it is ineffectual in so far as it provides that the respondent shall not accept traffic between Kansas City and Topeka. Can the one part be sustained and the other part held void?

"Now it must be admitted, we think, that if this contract were to be sustained and enforced with the proviso stricken out, it would be a very different contract from that which we now have before us. It would, moreover, be a contract which we cannot think it probable these parties themselves would ever have agreed to make. *The proviso was beyond doubt a principal inducement on the part of the Union Pacific for entering into the arrangement; and we can not conceive that its managing authorities would ever have consented to the respondent coming upon its track to be competitor with it for traffic at all local points.* To strike out the proviso by holding it void would therefore be to take from the Union Pacific what probably constituted on its part a vital consideration and inducement for entering into a contract which, it is assumed, must now stand and be enforced without it. This assumption is grounded on the legal principle that an unlawful provision in a contract otherwise good may be rejected and the contract in other respects be sustained. We do

not, however, understand this principle to go so far as to warrant the sustaining of a contract when that which is illegal in it is the consideration itself; and the contention in this instance must go to that extent, or it will fail to meet the requirements of the case. The answer to it will then be, that a contract whose consideration is immoral or otherwise illegal and therefore void, is itself void, because it then lacks one of the necessary requisites to any legal validity whatever.

"It must further be conceded that to enforce the contract according to the views of complainant would be in effect to make a new contract for the parties, very essentially different from the one to which they gave assent. It would not only give to the Union Pacific a competitor upon its own tracks, but it would force the respondent into a competition to which it never gave assent, and which might, perhaps, be altogether undesirable and unprofitable. *We do not think we have any power to make any such contract for the parties: they must make their own contracts, and when made the contracts must either be valid in their essential provisions, or they must be altogether void. Courts or other tribunals can not remodel and then enforce them, especially when if so remodeled it is obvious the parties themselves would not have made them.*

"Either therefore this proviso which attempts to preclude the respondent from accepting traffic between Kansas City and Topeka must stand, or the whole contract must be held void. Complainant does not attack the contract as a whole, but concedes that it gives to the respondent rights of

trackage, and contends that it not only imposes upon respondent duties and obligations to the full extent contemplated by the parties in making it, but also further duties and obligations under the laws of the state and of the nation. This view, for the reason already given, we cannot accept * * *." (Emphasis supplied.)

*Hocking Domestic Coal Co.* v. *K. & M. Ry. Co.*, 44 I.C.C. 392, is another instance in which the Commission upheld the validity of a trackage agreement. This was the same trackage agreement as that involved in *K. & M. Ry. Co.* v. *The Public Utilities Commission of Ohio*, 96 Oh. St. 414, which was upheld by the Supreme Court of that state. At page 399 of its report (44 I.C.C. 392), the Commission said:

"Another contention strongly urged by counsel for the complainant is that the reservation by the Hocking Valley to itself of the exclusive use of the private switch tracks hereinbefore mentioned is void and against public policy. * * * It is, of course, the well-settled law that a railroad may not render itself incapable of performing its duties to the public or absolve itself from those obligations without the consent of the state. It will serve no useful purpose, however, to enter upon any discussion of the cases. It will suffice to say that the authorities clearly establish the doctrine that an owning and operating railroad may give trackage rights to another carrier over a part of its line, where such a grant does not impair the performance of its own duties to the public as a common carrier, and, in the absence of a controlling statute, *that the*

*owning carrier may, by the terms of the agreement, prohibit the grantee from exercising its functions as a common carrier with respect to traffic upon the line of track so granted.* Such provisions do not impair the common-carrier obligations of the grantee on its own line, and the grant may indeed enlarge the ability of the grantee carrier to serve patrons on its own line. The general principles will be found stated at some length in *Union Pacific Ry. Co.* v. *Chicago, etc., Ry. Co.*, 163 U. S. 564, 593, 594, 595. Speaking of a similar limitation in *Alford* v. *C., R. I. & P. Ry. Co.*, 3 I. C. C. 519, 531, this Commission said that the rights of the lessee with respect to the leased line 'are not the general rights of a common carrier upon its own road, but are limited and qualified by the agreement. They are simple contract rights which the law does not and can not enlarge.'" (Emphasis supplied.)

Other decisions of the Commission sustaining the validity of trackage agreements are summarized in the footnote.[36]

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[36] *Chicago, M., St. P. and P. R. Co. Trustees Operation*, 247 I. C. C. 1, 7 (decided after the passage of the Transportation Act of 1940 conferring specific authority upon the Commission to approve certain types of agreements between carriers by virtue of Section 5(2) of the Act. The Commission pointed out that other trackage agreements between carriers could still be made without its approval); *Texas & N. O. R. Co. Operation*, 249 I. C. C. 595; *Abandonment by Chicago, Rock Island and Pacific Ry. Co.*, 131 I. C. C. 421. (in the last two cases the Commission held that it was not empowered under Section 1(18) of the Act to authorize the abandonment by a carrier of its mere contractual right to operate over the railroad of another carrier: *"We have no jurisdiction over the contractual right of one carrier to operate over the road of*

In view of the foregoing authorities, there can be no doubt that the Commission erred in assuming authority to hold the trackage agreement between the Stock Yards and the New York Central respecting the use of Track 1619 valid insofar as it granted a use to the railroad, but invalid insofar as it restricted the type of use permitted. The Commission had no authority whatever under the circumstances. The trackage agreement between the common carrier and the non-carrier in this case was beneficial to all persons concerned, particularly so in the case of Swift & Company, which arranged for the plan under which Track 1619 was utilized, beginning in 1910, with knowledge that such track was not used for livestock purposes. It ill-behooves one who has thus reaped the benefit of an arrangement for over a quarter of a century to claim that such arrangement is partially invalid because he now finds that it would

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*another carrier, except as such right is exercised in the operation of the road.*" (131 I. C. C. 421, at p. 429, Emphasis supplied); *Merchants Refrigerating Co.* v. *New York Central R. R. Co.*, 238 I. C. C. 599 (in this case the carrier had rented a spur track to a non-carrier. The Commission said, at page 604, "This is an arrangement to connect defendant's line with complainant's private siding and to provide for the continuance and upkeep of the spur track. It is not a contract for transportation itself, or for the movement of particular shipments. The rent is payable even if no shipments are made. It is beyond the jurisdiction of this Commission. *Ziegler Bros.* v. *Southern Ry. Co.*, 157 I. C. C. 660. ***"); *Missouri-Kansas-Texas R. R. Co.* v. *K. C. T. Ry. Co.*, 104 I. C. C. 203 (upheld contract made by carriers for use of terminal facilities. See particularly discussion on pages 222 *et seq.* The decision of the Commission was subsequently affirmed in *United States* v. *Interstate Commerce Commission*, 71 F. (2d) 336, and *United States ex rel. Chicago, etc.* v. *Interstate Commerce Commission*, 294 U. S. 50).

be desirable to have a different arrangement than the one actually made.

The New York Central and the other carriers who are appellees in this action have not been disabled by virtue of the contractual arrangement from performing any of the duties imposed upon them by the Interstate Commerce Act, as amended, with respect to the lines they control. They have no power to perform the duties presently sought to be imposed upon them by the appellants. *Alford* v. *Chicago, Rock Island and Pacific Ry. Co.*, 3 I.C.C. 519, 532-533. The trackage agreement has enabled Swift & Company, as well as a number of other industries, to have the means of securing supplies and making shipments in and out of their plants of every type of commodity except livestock for over three decades without the necessity of going to the expense of constructing a track of their own. The bald situation is here presented of a party which for years has reaped the benefit of this arrangement now seeking to disrupt that arrangement because it would be convenient for present purposes to do so.

## III

### THE COMMISSION'S ORDER IS INVALID

The order of the Commission of May 3, 1946 (R. 64-65) is clearly invalid as to the Stock Yards, both because the Stock Yards has done nothing to impair its right to limit the use of Track 1619 to such transportation thereon as does not interfere with its own business and because the Commission is, in no event, empowered to limit the Stock Yards' control over use of Track 1619. In spite of this, the Commission ordered both the

common carriers by rail and the Stock Yards to cease, and to desist and to abstain from, refusing to deliver interstate shipments of livestock to the sidetrack of Swift & Company at Cleveland, Ohio, and to establish and maintain in force a schedule providing for such deliveries of livestock.

Both the Stock Yards and the carriers are at a loss to determine how to comply with such an order. The Stock Yards cannot abstain from refusing to deliver livestock to Swift & Company. It is equally impossible for the Stock Yards to perform the second command of the Commission's order, namely, to establish a schedule for the delivery of livestock to Swift & Company's siding by filing a tariff with the Commission. The Stock Yards is not engaged in transportation, owns no trains, and has never held itself out to the public as having facilities to transport passengers or property over Track 1619.

On the other hand, the common carriers by rail are also confronted with a grave problem insofar as compliance with the Commission's order is concerned. There is no contention in this connection that the Commission, as an abstract matter, lacks jurisdiction over the persons of the common carriers. But the jurisdiction of the Commission, even with respect to such common carriers, is not such as to confer upon the Commission authority to compel the common carriers to perform some act which is *physically* or *legally* impossible for them to carry out. The carriers are under no duty to perform that which they have no power to perform. The only right which the carriers have to operate over Track 1619 is that conferred upon them by virtue of the trackage agreement between

the New York Central and the Stock Yards. This contract is a mere agreement for restricted running arrangements subject to the conditions heretofore pointed out. *Union Pacific Ry.* v. *Chicago, etc., Ry.*, 163 U.S. 564, 583. If the railroads were to attempt to operate over this track in violation of such contractual limitations, they would subject themselves to liability for damages, to suits for injunctions, and to possessory actions. *Secombe* v. *Milwaukee, etc., R. Co.*, 23 Wall. 108, 118; *Salt Lake City* v. *Hollister*, 118 U.S. 256, 260; *United States* v. *Lynah*, 188 U.S. 445, 467; *Northern Pacific R.R.* v. *Smith*, 171 U.S. 260, 271; *Roberts* v. *Northern Pacific R.R.*, 158 U.S. 1, 11; *Osborne* v. *Missouri Pacific Ry.*, 147 U.S. 248, 258; *Bass* v. *Metropolitan West Side Electric R.R.*, 82 Fed. 857; and *Wagner* v. *Railway*, 38 Oh. St. 32. All of these remedies would be available to the Stock Yards in the case at bar, including even the possessory actions (ejectment or trespass), because, unlike the situation in *Northern Pacific R.R.* v. *Smith*, 171 U.S. 260, and *Roberts* v. *Northern Pacific R.R.*, 158 U.S. 1, the record in the case at bar does not present a situation in which a landowner permitted a railroad company *without objection* to take possession of his land, construct a track and operate the road.

In the brief filed on behalf of the Government, it appears to be conceded that the carriers would subject themselves to legal action at the suit of the Stock Yards in the event they were to try to move livestock over Track 1619. The appellants are correct in this concession, but if the carriers would subject themselves to such legal action, as undoubtedly they would, it is because they would

be committing a legal wrong against the Stock Yards by so operating over Track 1619. In short, they have no legal right to operate over such track for such purpose. Thus, the Government has failed to pursue to its ultimate conclusion the logic of its concession regarding remedies.

The Interstate Commerce Commission itself has heretofore taken the position that a carrier is not guilty of a violation of the Interstate Commerce Act, as amended, in failing to operate over industrial sidetracks where *legal* or *physical* obstructions prevent such operation and that the Commission will not order such operation under these circumstances. Thus, in *Limits Industrial Building Corporation et al.* v. *B. & O. Co.*, 258 I.C.C. 438, 441, the Commission stated that:

> "* * * Common-carrier services over private sidings and private industrial tracks cannot be expected and certainly cannot be compelled, where obstructions against the use thereof, either legal or physical, not caused by a carrier, prevents it from entering upon those tracks. Nor is it within our jurisdiction to order a carrier or any other party, to take steps to remove such obstructions."

Other decisions of the Commission holding that service over private tracks by common carriers cannot be compelled under the Act are *Rex Jellico Coal Co. et al.* v. *Louisville and Nashville Ry. Co.*, 237 I.C.C. 67, 70-71; *Winnsboro Granite Corporation* v. *Southern Ry. Co.*, 176 I.C.C. 481; *Alexander King Stone Co.* v. *Chicago, I. & L. Ry. Co.*, 160 I.C.C. 245, 257; and *Certain-Teed Products Corp.* v. *C., R. I. & P. Ry. Co. et al.*, 68 I.C.C. 260, 262.

The report of the Commission is confusing and was accompanied by no separate findings of fact.[37] The confusion is compounded in the brief filed on behalf of the Government (pp. 64 *et seq.*), where the amazing position is taken that the Commission's order does not "necessarily involve the use of Track 1619" or require action on the part of the Stock Yards. It was with the sole object of securing such use that the proceeding was instituted by Swift & Company before the Commission. It was the point discussed and argued before the Commission and before the court below. It is hard to comprehend how appellants can now contend that the Commission's order does not involve Track 1619 or the Stock Yards. If such is the case, why was the Stock Yards ever brought into this proceeding? At all events, it cannot be de-

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[37] This Court has frequently said that it will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for an order. *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 295 U. S. 193. In the absence of a finding of essential basic facts, of course, an order cannot be sustained. *Florida* v. *United States*, 282 U. S. 194, 215. The Court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433. See *Beaumont S. L. and W. Ry.* v. *United States*, 282 U. S. 74, 86; *Interstate Commerce Commission* v. *Chicago, Burlington and Quincy Ry. Co.*, 186 U. S. 320, 341. In view of the frequent expressions of this Court as to the necessity of findings of some sort by administrative agencies, such as the Interstate Commerce Commission, it appears that the order in the case at bar—particularly in view of the impossible nature of the order as applied to the two classes of appellees apparent from the face thereof—would be invalid on the ground of lack of adequate findings alone.

nied in good faith that the Commission had in mind Track 1619 when it made its order.

Equally untenable is the Government's argument in its brief (p. 36) to the effect that considerations of ownership of and contractual limitations on the right to use Track 1619 are as irrelevant as questions relative to mortgages and reorganization proceedings with respect to other portions of the lines of the common carrier appellees. Whatever those mortgages and reorganization proceedings referred to may be, it appears that the common carrier appellees have the legal *control* and, consequently the *right* to operate over such lines. Thus, there is a basis upon which a duty can be predicated. But this is not true with respect to Track 1619, where no legal right is given to the carriers with respect to the movement of livestock and where, consequently, no power or duty attaches.

## CONCLUSION

In view of the foregoing, it is respectfully submitted that the order of the Commission of May 3, 1946, was unlawful and that the final order and judgment of the court below of May 14, 1947, should be affirmed.

Respectfully submitted,

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January 27, 1948.

# APPENDIX A

## PERTINENT STATUTORY PROVISIONS

(Supplementing those appearing in Appendix A of the Government's Brief)

### 1. INTERSTATE COMMERCE ACT, AS AMENDED, PART I (49 U. S. C. 1 ET SEQ.)

SEC. 1. * * *

* * *

(7) No common carrier subject to the provisions of this part shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees, its officers, surgeons, physicians, and attorneys at law, and the families of any of the foregoing; to the executive officers, general chairmen, and counsel of employees' organizations when such organizations are authorized and designated to represent employees in accordance with the provisions of the Railway Labor Act; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled

Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail-service employees and persons in charge of the mails when on duty and traveling to and from duty, and all duly accredited agents and officers of the Post Office Department and the Railway Mail Service and post-office inspectors while traveling on official business, upon the exhibition of their credentials; to customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this part: *Provided further*, That the term "employees" as used in this

paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars or more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof.

(8) From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other

than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

* * *

(14) (a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for non-observance of such rules, regulations, or practices.

(b) It shall be unlawful for any common carrier by railroad or express company, subject to this part, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier or express company of protective service against heat or cold to property transported or to be transported in interstate or foreign commerce, or for any such carrier or express company to continue after April 1, 1941, as a party to any such contract, agreement, or arrangement unless and until such contract, agreement, or arrangement has been submitted to and approved by the Commission as just,

reasonable, and consistent with the public interest: *Provided*, That if the Commission is unable to make its determination with respect to any such contract, agreement, or arrangement prior to said date, it may extend it to not later than October 1, 1941.

* * *

SEC. 3. * * *

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(5) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal

facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

* * *

SEC. 5. * * *

* * *

(2) (a) It shall be lawful with the approval and authorization of the Commission, as provided in sub-division (b)——

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such car-

rier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

* * *

SEC. 6 (1). That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the

public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

2. SECTIONS 1, 2, AND 3 OF THE ELKINS ACT (49 U. S. C. 41, 42, AND 43)

SEC. 41 (1). Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit,

accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either

jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

(2) In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of chapter 1 of this title or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under sections 41, 42, or 43 of this title, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section.

(3) Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of sections 41, 42, or 43 of this title, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset

against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

SEC. 42. In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceeding be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate,

regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

SEC. 43. Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations, forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed, or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against

the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by sections 41, 42, or 43 of this title shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by chapter 1 of this title. And in proceedings under said sections and chapter 1 of this title the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: *Provided*, That the provisions of sections 44 and 45 of this title shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission.

# SUPREME COURT OF THE UNITED STATES

No. 223.—October Term, 1947.

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| The United States of America, Interstate Commerce Commission and Swift & Company, Appellants, v. The Baltimore and Ohio Railroad Company, et al. | Appeal from the District Court of the United States for the Northern District of Ohio. |

[March 8, 1948.]

Mr. Justice Black delivered the opinion of the Court.

This case is properly here on appeal from a District Court decree enjoining enforcement of a cease and desist order of the Interstate Commerce Commission. 28 U. S. C. § 345; 71 F. Supp. 499. The order enjoined required the five railroad appellees [1] to abstain from refusing to deliver interstate shipments of livestock to the sidetrack of Swift & Company's packing plant at Cleveland, Ohio, and to establish tariffs for such deliveries. Swift's sidetrack has only one connection with a railroad. That connection is with the main line of the New York Central by way of a spur track, known as "Spur No. 245," operated by that railroad. One end of this spur owned by the New York Central connects with its main line; the other end of the spur, also owned by the railroad, connects with Swift's sidetrack and with other private sidetracks. A 1619-foot middle segment of the spur, known as "Track 1619," is owned by the Cleveland Union Stock Yards Company. Under the terms of a trackage agreement with Stock Yards, New York Central uses Track 1619 for deliveries to Swift's sidetrack and other private

[1] The railroad appellees are Baltimore & Ohio Railroad Company, the Erie Railroad Company, the Wheeling & Lake Erie Railroad Company, the New York Central Railroad Company, and the Pennsylvania Railroad Company.

sidetracks connected with Spur No. 245. Thus all interstate railroad shipments to Swift's siding and to others similarly located can be made only over the segment of track owned by Stock Yards. Because of its interest in Track 1619, Stock Yards was made a party to the proceedings before the Commission and was included in its cease and desist order along with the railroads.[2] So long as Stock Yards continues to own Track 1619, delivery of livestock and other freight by New York Central to Swift and others similarly located depends upon whether and to what extent Stock Yards will grant or has granted New York Central a right to operate over Track 1619. This present case involves the question of whether the railroads, and particularly New York Central, in making deliveries of livestock over Track 1619 to Swifts's sidetrack must comply with certain conditions imposed by Stock Yards in its present agreement with New York Central.

Track 1619 was constructed in 1899 on Stock Yards' property by Stock Yards and New York Central's predecessor in interest. A contemporaneous written agreement, cancellable on 60-days written notice by the railroad, gave the railroad a right to use the track for railroad purposes, provided the use did not interfere with Stock Yards' business. In 1910, after negotiations with the railroad, Swift built its sidetrack, and the railroad extended its Spur No. 245 by a track which connected Track

[2] Appellees argue that Stock Yards was improperly made a party and that the Commission was without power to include Stock Yards in its cease and desist order. We think § 2 of the Elkins Act, 32 Stat. 848, 49 U. S. C. § 42, justified the Commission's action and find no merit to the contention that we should by interpretation restrict that section's broad language authorizing inclusion as parties of "all persons interested in or affected by the rate, regulation or practice under consideration" by the Commission or by a court, and which provides that decrees may be made with reference to such additional parties to the same extent as though they were carriers.

1619 with Swift's siding. The 1899 written trackage agreement was superseded by another in 1924. This one was cancellable by either party on 30-days written notice. It provided that the railroad should maintain the tracks at its own expense, and it granted to the railroad "the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land." From 1910, when Swift's siding was constructed, to 1924, and for many years thereafter, the railroad continued to deliver all kinds of commodities to Swift and to other packers likewise served only by way of Spur No. 245 and Track 1619.

In the early 1930's Stock Yards concluded that it was losing patronage and fees because of delivery of livestock to Swift at its siding. A large source of Stock Yard's income comes from fees it charges for unloading and delivering interstate shipments of livestock to pens within its yard. Stock carried over Track 1619 to Swift's siding and to other private sidings are unloaded at those sidings; as a result Stock Yards loses the fees it would receive if livestock consigned to Swift and to other packers were unloaded at the Stock Yards. With a view toward collecting unloading fees from Swift and other packers served by Spur No. 245, Stock Yards instituted negotiations with the New York Central which in 1935 resulted in a modification of their 1924 agreement. The old 1924 agreement had unconditionally granted "Railroad, the free and uninterrupted use of any and all tracks . . . ." The 1935 modified agreement also granted New York Central "the free and uninterrupted use," of Stock Yard's tracks but added, "except for competitive traffic a charge for which use shall be the subject of a separate agreement."

After this 1935 restrictive modification Stock Yards demanded that the railroad adopt one of two courses with regard to livestock, which the parties agreed was the "competitive traffic" the modified agreement was designed

to suppress. The railroad must either stop carrying livestock over Track 1619 to Swift and other packers, or pay Stock Yards, for use of Track 1619 in carrying livestock to these packers, amounts equivalent to fees Stock Yards would have collected had the livestock consigned to them been unloaded and delivered in the yard. This amount was considered exorbitant by New York Central and the other railroads for whom New York Central performed switching charges, and they therefore refused to pay it. The result was that in 1938 the railroads ceased delivering livestock to the sidings of Swift and other packers served by Spur No. 245,[3] although they have under agreement with Stock Yards continued to use the spur for delivery of all other kinds of commodity shipments to these sidings. Swift demanded that the railroads deliver livestock to its siding, and in 1941 filed a complaint with the Interstate Commerce Commission upon their refusal to make deliveries.

After notice and hearing the Commission concluded that the railroad's refusal to carry livestock to Swift violated several provisions of the Interstate Commerce Act. It was found to violate § 3 (1) because of the discrimination against a single commodity, livestock, and because New York Central's deliveries of livestock to the sidetracks of some of Swift's nearby competitors, whose sidings were served without using Track 1619, subjected Swift to undue prejudice and gave those competitors an undue preference. The Commission also found that the

[3] In 1938 New York Central ceased to switch livestock carloads of other carriers over Spur No. 245 to Swift's siding, and it canceled its tariffs for this service. Since that time there has been no specific tariff authority for movement of livestock to Swift's siding when shipped to Cleveland over lines other than the New York Central. Although New York Central has never canceled its tariff for livestock shipments to Swift's Cleveland siding from points of origin on its own lines, it has delivered all livestock consigned to Swift's siding to Stock Yards since 1938. Swift has been forced to pay charges to Stock Yards to obtain possession of livestock unloaded at the yards.

failure to deliver under the circumstances shown was a violation of § 1 (6) which forbids unreasonable practices affecting the manner and method of delivering freight, and also a violation of § 1 (9) which requires railroads to operate switch connections with private side tracks without discrimination under such conditions as the Commission found to exist here.

The Commission's findings of fact are not challenged. There can be no doubt that those facts found would constitute a violation of the sections referred to if Spur No. 245 were wholly owned by the railroad. Ownership of Track 1619 by Stock Yards and its objection to livestock deliveries is, in fact, the only reason suggested for the railroads' failure to deliver shipments of livestock to Swift as they do to neighboring packers, and for their failure to provide switching connections for livestock shipments. From what has been said our question is this: Can the non-carrier owner of a segment of railroad track who contracts for an interstate railroad's use of the segment as part of its line reserve a right to regulate the type of commodities that the railroad may transport over the segment, or would such a reservation be invalid under the Interstate Commerce Act?

The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at wiping out discriminations of all types, *New York* v. *United States*, 331 U. S. 284, 296, and language of the broadest scope has been used to accomplish all the purposes of the Act. *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, 616. It would be strange had this legislation left a way open whereby carriers could engage in discriminations merely by entering into contracts for the use of trackage. In fact this Court has long recognized that the purpose of Congress to prevent certain types of discriminations and prejudicial practices

could not be frustrated by contracts, even though the contracts were executed before enactment of the legislation. See *Philadelphia, Balt. & Wash. R. Co.* v. *Schubert*, 224 U. S. 603, 613–614; *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467, 483, 485–86.

We think the provisions of the Interstate Commerce Act plainly empowered the Commission to enter this order against the discriminatory practices found, despite ownership of Track 1619 by Stock Yards. Section 1 (1) (a) makes the Interstate Commerce Act applicable to common carriers "wholly by railroad." Section 1 (3) (a) defines the term "railroad" as including "all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease and also all switches, spurs, tracks. . . ." As one of the many other indications that Congress did not intend its railroad regulatory provisions to depend on who had legal title to transportation instruments, § 1 (3) (a) also provides that the word "transportation" as used in the Act shall broadly include "locomotives . . . and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof . . . ." It is true, as appellees argue, that the above language of § 1 (3) (a) is definitional only. *Ellis* v. *Interstate Commerce Comm'n*, 237 U. S. 434. But it is also true that these definitions by their unambiguous language, make all trackage "in use by any common carrier" subject to the regulatory provisions of the Act, even though not owned by the carrier, but only used by it under a contract or agreement. Thus Track 1619, though owned by Stock Yards, was subject to the Act because of its use by the New York Central under trackage agreements.

It is just as prejudicial to shippers and the public for a railroad that uses a portion of track under lease or contract to discriminate, as it is for the discrimination

to be inflicted by a railroad that owns its entire track. Practically the only argument suggested to justify discriminatory practices under the circumstances here is that an owner has a right to let others use his land subject to whatsoever conditions the owner chooses to impose. It is even argued that to construe the Interstate Commerce Act as limiting that right would result in depriving an owner of his property without due process of law. But no such broad generalization can be accepted. Property can be used even by its owner only in accordance with law, and conditions its owner places on its use by another are subject to like limitations. Of course it does not deprive an owner of his property without due process of law to deny him the right to enforce conditions upon its use which conflict with the power of Congress to regulate railroads so as to secure equality of treatment of those whom the railroads serve.

Here Congress under its constitutional authority has provided that no railroad shall engage in certain types of discriminatory conduct in violation of three provisions of the Act. The Commission found that discriminatory conduct here. The excuse offered by the railroads is that the owner of Track 1619 required them to do the prohibited things. But the command of Congress against discrimination cannot be subordinated to the command of a track owner that a railroad using the track practice discrimination.

We hold that the Commission's order was authorized by statute and that it does not deprive Stock Yards of its property without due process of law. In doing so we do not pass upon any questions in relation to the dedication of Track 1619 to railroad use. Neither do we decide what are the relative financial rights of Stock Yards and New York Central under their contracts, nor whether Stock Yards can cancel the contract with New York Central, nor what would be the duty of New York

Central should Stock Yards attempt to terminate its right to use Track 1619. We only hold that Stock Yards' ownership of Track 1619 does not vest it with power to compel the railroads to operate in a way which violates the Interstate Commerce Act.

The Commission's order is valid and should be enforced.

*Reversed.*

MR. JUSTICE BURTON, dissenting.

For the reasons stated in the opinion of the District Court in this case, 71 F. Supp. 499, I believe that the order of the Interstate Commerce Commission exceeded its jurisdiction and that the judgment permanently enjoining the enforcement of such order should have been affirmed.